No. 98-83

In The

Supreme Court of the United States

October Term, 1997

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

Petitioners,

vs.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether law enforcement officers executing a warrant violate clearly established Fourth Amendment principles when they bring members of the press into a private home without the occupants' consent.

PARTIES TO THE PROCEEDING

The names of all of the parties appear in the caption.

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APPENDIX

Petitioners Charles and Geraldine Wilson and their granddaughter, Valencia Snowden, respectfully petition for a writ of certiorari to review the *en banc* decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fourth Circuit (App. A) is reported at 141 F.3d 111. The panel opinion (App. B) is reported at 110 F.3d 1071. The district court's oral opinion (App. C) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Factual Background[1]

On April 14, 1992, the Circuit Court for Montgomery County, Maryland issued a bench warrant for the arrest of Dominic Jerome Wilson based on an alleged violation of probation. The warrant permitted "any duly authorized peace officer" to arrest Dominic Jerome Wilson. App. 4a, 18a.

Two days later, on the morning of April 16, 1992, at approximately 6:45 a.m., Charles and Geraldine Wilson were lying in bed when they heard loud, persistent knocking on their front door. Mr. Wilson got out of bed to investigate. App. 20a-21a.[2]

When Mr. Wilson reached his living room he was confronted by respondents Perkins, Olivo, and Collins with their guns drawn. The officers were dressed in plain clothes. Paul Valentine and Margaret Thomas, a *Washington Post* reporter and photographer, respectively, were with them. App. 5a, 21a, 69a.

Mr. Wilson raised his hands in the air and respondents ordered him to lie on the floor. As he was complying, his wife entered the living room. The officers questioned the Wilsons concerning the whereabouts of Dominic Wilson, the Wilsons'

1. As stated by Judge Wilkins in the majority opinion, the material facts are not disputed. Petitioners' Appendix ("App.") 4a. The facts set forth in this section were all included in the Joint Appendix below. Where a fact is explicitly set forth in an opinion, citations are made to the page of the opinion as it appears in Petitioners' Appendix. To the extent no reference has been made to a particular fact in an opinion, citations are to the Joint Appendix ("J.A.") below.

2. The opinion below mistakenly identifies the date of the raid on the Wilson home as April 14, 1992. The correct date is April 16, 1992. App. 68a.

adult son. Mr. Wilson told the deputies that he was not Dominic, that Dominic did not live there, and that he had not seen Dominic for at least two weeks. Mrs. Wilson identified Mr. Wilson as her husband and confirmed that Dominic was not there. App. 5a, 69a; J.A. 89, 108.

Just prior to entering the Wilson home, the officers had reviewed an arrest worksheet and photographs of Dominic Wilson that showed him to be 27 years old, 185 pounds, and clean-shaven. On April 16, 1992, Charles Wilson was 47 years old, weighed 220 pounds and had a beard that was almost completely white. The officers were quickly aware that Charles Wilson was not Dominic. App. 64a, 69a; J.A. 142.

Perkins cursed at and threatened to arrest Charles Wilson if Dominic was found in the house. He then searched the home while Collins unlatched the back door to let in respondents Runion and Roynestad. Nobody else was in the house. App. 5a, 70a; J.A. 109.

The reporters remained in the Wilson home without the consent of the Wilsons. Ms. Thomas took photographs throughout the encounter, including photographs of Mr. Wilson, who was wearing only his underpants, and of Mrs. Wilson, who was wearing a sheer nightgown. She also took photographs of Mr. Wilson being forcibly detained, belly-down on his living room floor with Olivo's knee in his back and gun to his head. At no time were the Wilsons permitted to cover themselves decently. App. 4a-5a; 21a-22a, 63a-64a.

No deputy ever asked or instructed the reporters to leave the Wilson home. The reporters were permitted to stay in the house throughout the encounter, including after it was confirmed that Mr. Wilson was not Dominic and that Dominic was not there. They continued to remain in the Wilson home after Mr. Wilson asked everyone to leave. App. 63a-64a; J.A. 107-08.

Respondent Layne was a deputy U.S. Marshal and Washington, D.C. area site supervisor of Operation Gunsmoke, a joint federal/state effort by the U.S. Marshal's Service and local law enforcement agencies to apprehend fugitives. In this case, the local law enforcement agency was the Montgomery County, Maryland Sheriff's Department. App. 67a.

Layne assigned the media personnel to the Operation Gunsmoke team that entered the Wilson home. The reporters rode along with respondents as part of a two-week newsgathering activity by the *Washington Post*. App. 4a-5a. Layne provided the team with no guidance limiting the taking of the press into private residences, and some of the individuals on the team (all of whom are respondents) have admitted that they were aware of no authority that permitted them to bring the press with them into private residences. J.A. 119, 131-32. They have also admitted, and the district court found, that the press were not present at the Wilson home on April 16, 1992 to serve any law enforcement purpose. App. 21a; J.A. 107, 119-20, 132-33. Nonetheless, the officers actively invited and assisted the press to enter the home. Respondents placed no limits on what the reporters saw or did. App. 21a, 76a; J.A. 83, 119.

After the officers and reporters left the Wilson home, the Wilsons were able to locate Dominic at his girlfriend's apartment. They instructed him to walk to a nearby police station to turn himself in, which he immediately did. J.A. 81.

B. Legal Proceedings

The Wilsons brought a *Bivens* action in the District Court of Maryland alleging, among other things, that respondents' police-led media invasion violated their Fourth Amendment right to be secure in their home against unreasonable searches and seizures.

Respondents moved for summary judgment on qualified immunity grounds. The district court denied the motion relying primarily on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995). The district court found that the media intrusion in this case was clearly violative of well-established Fourth Amendment principles preserving the sanctity of the home, such as the specific warrant requirement. The district court further determined that the search of the Wilson home was objectively unreasonable due to the media's presence and that their participation in the search served no legitimate law enforcement purpose. *See* App. C.

Respondents brought an interlocutory appeal. In a 2 to 1 decision, a panel of the Court of Appeals reversed the district court. The majority found that a reasonable officer would not necessarily have understood that bringing the media into a private dwelling to observe the execution of a warrant violated any clearly established right. *See* App. B.

Petitioners filed a timely suggestion for rehearing *en banc*, which was granted. Oral argument was held before the *en banc* court on September 30, 1997. A majority of active judges then voted for a rehearing and a second *en banc* argument was heard on March 3, 1998. Judge Donald Russell, the dissenting judge on the original panel, passed away shortly before the second *en banc* argument. The final vote of the court was 6 to 5 to reverse the district court.

The majority defined the specific right alleged to be violated as the Wilsons'

> Fourth Amendment right to avoid unreasonable searches and seizures resulting from the officers' decision to permit members of the media who were not authorized to execute the warrant to enter into a private residence, without the homeowners' consent,

> to observe and photograph the execution of an arrest warrant.

App. 8a. The question before the court, then, was "whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it." *Id.*

The majority's analysis begins with the observation that the reporters did nothing that the officers themselves could not have done consistent with the terms of the arrest warrant. The Fourth Circuit then concluded that

> reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland [where the underlying events occurred] from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant.

App. 9a-10a.

Further, the majority found, a reasonable law enforcement officer could have believed that having the media along served a legitimate law enforcement purpose related to the execution of the warrant. A five-member plurality of the Court hypothesized that, for example, having the media present may afford protection by reducing the chance that a target of a warrant will resist arrest in the face of recorded evidence of his actions, or would improve public oversight and thus deter crime and improper police conduct. App. 10a. [3]

3. Judge Widener did not join the portion of the majority opinion providing these examples of legitimate law enforcement purposes in furtherance of the (Cont'd)

Judge Murnaghan wrote a dissenting opinion in which four other members of the Court joined. The dissent carefully examined whether there are Fourth Amendment principles that are so clearly established that the unlawfulness of respondents' conduct would have been apparent to a reasonable law enforcement officer. The dissenters concluded that there are. At common law and throughout the history of Fourth Amendment jurisprudence the sanctity of the home has always received the highest protection. In *Silverman v. United States*, 365 U.S. 505, 511 (1961), for example, this Court recognized that at the very core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *See* App. 24a.

The dissent also recounted the history of another well-established Fourth Amendment principle, the specific warrant requirement. As Judge Murnaghan noted, it has long been established that an officer executing a warrant must tailor his conduct "strictly within the bounds set by the warrant." App. 27a. (*quoting Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394-95 n.7 (1971)). Correspondingly, any action not specifically mentioned in a warrant is unconstitutional unless it is reasonably necessary to further its purposes. App. 27a-28a. In this case, the dissent concluded, that clearly established standard had not been met.

REASONS FOR GRANTING THE WRIT

This case presents important and timely questions regarding the scope of the Fourth Amendment's protection of the home, and the scope of qualified immunity, on which the circuits have split two to two.

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execution of the warrant that a reasonable officer could have believed were served by the media's presence. *See* App. 17a (Widener, J., concurring). Thus, only five of the eleven judges joined this part of the opinion.

I.

THE CIRCUITS ARE IN CONFLICT OVER WHETHER LAW ENFORCEMENT OFFICERS EXECUTING A WARRANT CONTRAVENE CLEARLY ESTABLISHED CONSTITUTIONAL PRINCIPLES WHEN THEY BRING THE PRESS INTO A PRIVATE HOME FOR NEWSGATHERING PURPOSES.

The decision below squarely conflicts with the Second Circuit decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) and the Ninth Circuit decision in *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *petitions for cert. filed*, 66 U.S.L.W. 3783 (May 26, 1998) (97-1914 and 97-1927).

In *Ayeni*, a Secret Service agent executing a search warrant in New York City invited a CBS television crew from the newsmagazine "Street Stories" into a private home to videotape a search for evidence of credit card fraud. A mother and child, neither of whom was suspected of any wrongdoing, were home alone when the search took place. The camera crew videotaped the mother and child as well as the family's personal effects as the officers conducted their search.

The Second Circuit found the law clearly established that

> law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

Ayeni, 35 F.3d at 686. The court upheld District Judge Weinstein's decision that the conduct at issue violated the Fourth

Amendment's prohibition on unreasonable searches and seizures, that the right of the Ayenis to be protected from an agent bringing into their home persons not expressly or impliedly authorized to be there was "clearly established," and that the agent could not reasonably have believed his actions were consistent with the Fourth Amendment. *Id.* [4]

In *Berger*, a CNN camera crew accompanied U.S. Fish and Wildlife Service agents while they executed a search warrant at Paul and Erma Berger's 75,000 acre Montana ranch. At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. The agents were searching for evidence indicating the taking of wildlife. Mr. Berger was suspected of killing eagles.

CNN did not enter the Berger home, but one of the federal agents who did was wired with a hidden microphone that transmitted live audio to a CNN technical crew. Relying on *Ayeni* and an earlier Fourth Circuit decision, *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (discussed *infra*), the Ninth Circuit concluded that the federal officers were not entitled to qualified immunity.[5]

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4. A district court in the Third Circuit has followed *Ayeni* in finding that two Philadelphia police officers were not entitled to qualified immunity for bringing two reporters and a photographer from the *Philadelphia Daily News* into a private home to cover the execution of a search warrant. *Hagler v. Philadelphia Newspapers, Inc.*, C.A. No. 96-2154, 1996 WL 408605 (E.D. Pa. July 12, 1996). The court concluded that "a reasonable person would know that the purpose of a warrant is to facilitate proper law enforcement, not to provide a 'photo opportunity.' A search warrant is simply not a press pass." 1996 WL 408605, *2.

5. The present case, unlike *Berger*, involves the more typical situation of the media personnel being brought inside the home without the occupants' consent. Every police/media intrusion case cited herein (other than *Berger*), involves physical entry into the home by the press without consent. Other very recent lawsuits also involve media home intrusions, but not necessarily

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Two Circuits have ruled the other way.

The Eighth Circuit rejected *Ayeni* in *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). In *Parker*, police tipped off a local television reporter in St. Louis, Missouri to a weapons investigation. The police drove the reporter and a cameraman to the home of a mother and her sixteen-year-old daughter, neither of whom was suspected of any crime. The target of the warrant was a male relative who was staying with them, but who was not inside the house while the search was being conducted. The cameraman videotaped the mother and daughter and the search of their home. The videotape was then shown on local news broadcasts on four separate days.[6]

In assessing whether clearly established law prohibited such conduct, the Eighth Circuit pointed out that, before the conduct challenged in *Parker* took place, only three cases had addressed the unconstitutionality of press accompanying police executing warrants inside a home.[7] The Eighth Circuit noted that those

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by the traditional press. Instead, camera crews from "reality-as-entertainment" television shows tag along with law enforcement officers. *See Reeves v. Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997) (occupant of home sued production company of the television show *COPS* for invasion of privacy caused by television camera crew recording encounter with police inside his home); Minerva Canto, *Baseball All-Star's Widow Suing L.A.*, L.A. Daily News, Oct. 10, 1997, *available in* 1997 WL 4055786 (Widow of baseball great Curt Flood sued city, police officers and production company of reality-based show *Placas* for raiding her home during a party "to provide the reality-based show *Placas* with 'exciting footage.' ")

6. These facts are taken from the district court opinion. *See Parker v. Clarke*, 905 F. Supp. 638, 640-41 (E.D. Mo. 1995).

7. *Parker v. Boyer*, 93 F.3d at 447 (citing *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. (Cont'd)

courts had "rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it." *Id.* The Eighth Circuit, moreover, unlike the Second Circuit, did not think it

> self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant.

Id. The court concluded, accordingly, that a reasonable law enforcement officer would not have known that allowing television cameras to participate in a search violated clearly established law. *Id.*

The decision of the Fourth Circuit in the present case accords with the Eighth Circuit's decision in *Parker*. The Fourth Circuit found respondents immune from liability despite its own prior precedent in *Buonocore v. Harris* that found that police officers executing a warrant may not bring telephone company personnel not authorized by the warrant into a home to search for company property unrelated to the warrant. In distinguishing *Buonocore*, the majority characterized the question in *Buonocore* as whether police may constitutionally invite a third party to "undertake an independent search for items not described in the warrant." App. 11a n.6. Petitioners argued below that the *Washington Post* reporters were similarly on an

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L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W. 2d 768 (Wis. Ct. App. 1980)). *Parker* also cited *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984), a case that is inapposite. The *Avenson* plaintiffs claimed that the failure of police officers executing a search warrant to remove the press from their land (not from inside their home) violated their right to equal protection under the law. The court found, for reasons unrelated to the presence of the media, that no equal protection violation was alleged. 577 F. Supp. at 962.

independent search for news and information and photographic images not described in the warrant. Without explaining its reasoning, the majority simply asserted in a footnote that, "[o]f course, the officers here permitted no such general independent search by the reporters." *Id.*

In sum, the present state of the law is that police-led media invasions of private property are clearly unconstitutional in the Second and Ninth Circuits, and not clearly unconstitutional, if unconstitutional at all, in the Fourth and Eighth Circuits.[8]

The fact that so many courts of appeals have just recently ruled on this conduct underscores how it represents a new and growing phenomenon that threatens important privacy interests protected by the Fourth Amendment. Its prevalence is featured in a recent flood of newspaper and law review articles that note, in particular, the recent popularity of "reality-as-entertainment" television shows that regularly broadcast footage of law enforcement encounters with residents in private homes.[9]

8. Neither the Eighth Circuit not the Fourth Circuit ruled on the underlying constitutional issue, limiting their decisions to the question of immunity. The one other court of appeals decision that has addressed the issue of media participation in a search is *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996). Unlike the other cases, the search warrant in *Stack* authorized "videotaping and photographing." The court concluded that

> even though the warrant said nothing about a television crew, the defendants were justified, under the explicit language of the warrant, in permitting the accompaniment of camera personnel.

96 F.3d at 163. To the extent that *Ayeni* and *Berger* hold that the Fourth Amendment clearly requires that only persons designated in a warrant may execute it, *Stack*, too, conflicts with those decisions. Moreover, in our view, the Fourth Amendment would not permit news media to be brought into a private home even if a warrant so specified.

9. *See* Paul Brownfield, *Reality Shows Raise Question of Privacy*, St. Louis Post-Dispatch, June 23, 1998, *available in* 1998 WL 3340523; Maura Dolan, (Cont'd)

The split in the circuits allows this practice to continue unabated in at least the Fourth and Eighth Circuits,[10] if not elsewhere. As declared This Term, "an immunity determination, with nothing more, provides no clear standard, constitutional or non-constitutional." *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998). If the standard remains unclear, then, by definition, qualified immunity would apply to immunize law enforcement officers from liability for continuing

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The Right to Know vs. The Right to Privacy; With Cameras Following Cops and Accident Scenes Being Broadcast on TV, The Law is Struggling to Keep Up As Tabloid Shows Get More Aggressive, L.A. Times, Aug. 1, 1997, at A1; David E. Bond, Note, *Police Liability for the "Media Ride-Along,"* 77 B.U. L. Rev. 825 (1997); Sally S. Campbell, Note, *Lights, Cameras, Access: Should the Police Provide the Means for Television Stations to Violate the Fourth Amendment?*, 22 U. Dayton L. Rev. 351 (1997); Recent Case, 110 Harv. L. Rev. 1340 (1997); Brad M. Johnston, Note, *The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment*, 58 Ohio St. L.J. 1499 (1997); Kevin E. Lunday, Note, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis*, 65 Geo. Wash. L. Rev. 278 (1997); Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals" — The Outlawing of Police/Media Home Invasions in Ayeni v. Mottola*, 16 Loy. L.A. Ent. L.J. 325 (1995).

10. Conversely, the practice should have stopped in the Second and Ninth Circuits. Yet, the Buffalo News reports in its September 1, 1995 edition that four film crews from the show *Cops* followed Buffalo police officers and Erie County sheriff's deputies during the month of July, 1995, almost one year after the *Ayeni* decision. Although the article does not say whether the camera crews went into people's homes, it recounts the story of a local college professor who was videotaped in his doorway by a camera crew that followed police onto his front porch. When he asked about the cameras, the professor was told that the footage was for a police training film. Only later did he find out its true purpose. Tom Buckham, *Activist Drops Suit After Part of 'COPS' Video is Erased; Case Prompts Some to Criticize City For Bargaining With Producers of Show*, Buffalo News, Sept. 1, 1995, *available in* 1995 WL 5498681.

to bring the media into private homes without the occupants' consent. The threat is particularly serious for citizens living in circuits that look only to the law of their own circuit in assessing whether a right is clearly established. If officials were to raid the Wilson home again tomorrow, for example, the Wilsons would not, under Fourth Circuit law, be able to rely on *Ayeni* or *Berger* to show that their right to be free from such conduct was clearly established. *See* App. 7a ("The law is clearly established . . . when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state.")[11] This issue needs to be authoritatively decided by this Court.

II.

THE DECISION BELOW VIOLATES THIS COURT'S SETTLED FOURTH AMENDMENT PRECEDENTS REGARDING THE PERMISSIBLE SCOPE OF A SEARCH PURSUANT TO AN ARREST WARRANT.

The Fourth Amendment "confines an officer executing a search warrant strictly within the bounds set by the warrant."

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11. *See also Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997) (explaining that "[o]rdinarily, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent"), *cert. denied*, 118 S. Ct. 1560 (1998); *Jenkins v. Talladega City Bd. of Ed.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (*en banc*) (explaining that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, [the] Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose"), *cert. denied*, 118 S. Ct. 412 (1997). *But see Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990) ("Absent binding precedent, we look to all available decisional law"); *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 431 (7th Cir. 1989), *cert. denied*, 498 U.S. 949 (1990) (same); *Melear v. Spears*, 862 F.2d 1177, 1184 n.8 (5th Cir. 1989) ("[r]elying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic").

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 394 n.7 (1971). The arrest warrant in this case not only identified the individual who the officers were entitled to search for and seize, but also those who were entitled to search for and seize him: "duly authorized peace officer[s]." There was no express authorization in the warrant for the media to search for or seize anyone. The warrant also did not expressly authorize anyone, including the media, to search for or seize news, information, photographic images, or anything else. The only "item" that anyone was expressly authorized to search for and seize was Dominic Jerome Wilson. Clearly, the warrant carried with it no express authorization for law enforcement officials to bring the media with them inside the Wilson home for independent, newsgathering purposes.

Absent express authorization, clearly established law required that authorization either be: (1) implied by the terms of the arrest warrant, *see Michigan v. Summers*, 452 U.S. 692, 705 (1981); or (2) supplied by one of the clearly delineated exceptions to the warrant requirement. *See Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971).

No exception to the warrant requirement for media news searches has ever been recognized by this Court, nor have respondents so claimed. The absence of a recognized exception to the specific warrant requirement establishes that these officers violated clearly established law: searches of private homes must be authorized by warrant, and must remain strictly confined to the scope the warrant describes.

Neither was the media entry authorized under the implicit-authority doctrine of *Summers*. *Summers* held that officers executing a search warrant for contraband had implicit, limited authority to detain occupants of the premises while the search was being conducted. The detention was justified by: (1)

legitimate law enforcement purposes (safety of the officers and prevention of flight); and (2) articulable and individualized suspicion that the detained person harbored contraband. 452 U.S. at 705.

Summers cannot be read to do anything more than to permit an officer to take steps that are not spelled out in the warrant, but which must be taken in order to effectuate the warrant's purposes. The narrow holding in *Summers* is underscored by the case upon which *Summers* relies, *Payton v. New York*, 445 U.S. 573 (1980). *Payton* recognized the implicit, "limited authority [of an arrest warrant] to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603. The ability to enter a house is, of course, necessary to arrest someone who, for example, refuses to leave it.

The law enforcement interests at stake here cannot seriously (and certainly not reasonably) be compared to those at stake in *Summers* and *Payton*. The interests, if any, are slight, remote and wildly speculative. A plurality of Fourth Circuit judges, however, managed to conjure up two examples of legitimate law enforcement interests that they thought a "reasonable officer" might have believed were served by having the press along. The examples provided by the plurality, even if legitimate, are so distant from the purposes that permitted the officers to be inside the Wilson home that, if accepted, they would effectively eliminate any restrictions imposed by a warrant's limited scope, and thus wholly ignore this Court's established prohibition on general warrants. Under the plurality's standard, the limited scope of an express warrant becomes meaningless in the face of an officer's — or court's *post hoc* — speculation as to whether even a nebulous and remote law enforcement purpose would be served by expanding a search beyond a warrant's scope.

The plurality speculated that a suspect would behave herself in the face of recorded evidence of her actions. The easy response to this point is that if a reasonable officer actually believed that stillshot photography was necessary to deter misconduct, then the officers themselves might have taken photographs. Having the press, as opposed to the police, take the pictures intensifies the privacy invasion without corresponding gain in advancing any law enforcement purpose. In any event, as the dissent correctly observed, it is "absurd" to suggest that a reasonable officer could have concluded that the media's presence afforded assistance.[12]

The second law enforcement purpose related to the warrant that the plurality identified was that the media's presence contributed to accurate reporting of law enforcement activities which in turn helps deter crime and police misconduct. As important as that media function may be, in this context it is an exception that would effectively swallow the Court's traditional rules regarding the sanctity of the home and the importance of the warrant requirement. Moreover, it has nothing to do with furthering the purposes of the specific warrant at issue, which *Summers* requires.[13]

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12. The dissent further explained:

> The reporters might also have helped by carrying the warrant while the officers handcuffed suspects, or by holding the door open for an officer while he was carrying contraband; but to uphold the police actions because of the potential for fortuitous assistance, despite clearly not being designed to serve law enforcement, would make a mockery of the rule that an officer's actions are limited to the scope authorized by the warrant. The exceptions to this strict limitation permit only those actions reasonably necessary to accomplish the purpose of the warrant.

App. 33a-34a (citations omitted).

13. The dissent also attacks this media supervision justification:

(Cont'd)

Finally, even if the presence of the press in petitioner's home did not violate the Warrant Clause, the reasonableness requirement of the Fourth Amendment would still demand that the law enforcement interest be more than merely negligible, but indeed sufficient to justify the invasion of petitioners' privacy. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989). The Fourth Circuit never engaged in any reasonableness analysis. Instead, the decision below essentially ignored the cherished Fourth Amendment protections of those inside their homes that were trampled in this case. And, it paid no heed to the principle that "greater intrusiveness requires greater justification." Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 35 (1997).

As this Court has often observed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). "A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Silverman v. United States*, 365 U.S. 505, 511-12 n.4 (1961) (quotation omitted). The zone of privacy enjoyed by citizens is never more clearly defined "than

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(Cont'd)

> If, for example, the police officers had a warrant to perform a body cavity search on Mrs. Wilson, the majority implies that they could have believed the warrant authorized them to allow members of the public to watch. . . . Such a search would be patently unreasonable. . . . In today's case the majority finds that it was not clearly unreasonable for a police officer to force at gunpoint a citizen in his underwear to pose for a camera, potentially to be exhibited to the entire viewing readership of the *Washington Post*. This, too, was patently unreasonable.

App. 41a-42a.

when bounded by the unambiguous physical dimensions of an individual's home." *Payton*, 445 U.S. at 589.

The conduct involved in this case was especially destructive of privacy. It is humiliating enough to have a squad of law enforcement officers invade your home at 6:45 a.m. But the invasion of privacy is substantially aggravated when the officers invite the press to record the encounter for possible future publication to the general public. If inmates in prison "are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters." *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (plurality opinion), then photographing innocent people in their homes *obviously* violates fundamental privacy rights. No reasonable officer could have believed otherwise.

III.

THE CIRCUITS ARE IN CONFLICT OVER WHETHER PETITIONERS' RIGHT WAS CLEARLY ESTABLISHED AT THE REQUISITE LEVEL OF SPECIFICITY TO OVERCOME QUALIFIED IMMUNITY.

The Fourth Circuit relied on an overly demanding interpretation of qualified immunity to find petitioners' rights insufficiently well established. The court held that

> even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

App. 10a. In other words, the court of appeals held that this Court's constitutional rule may have been clear as a general matter, but it had yet to be elaborated with the requisite factual specificity to satisfy the Fourth Circuit's qualified immunity standard, which would require cases specifically establishing that "permitting reporters to observe the events surrounding the execution of an arrest warrant" is unconstitutional. That holding conflicts with this Court's decisions and with decisions of other circuits, including, most squarely, the Second Circuit in *Ayeni* and the Ninth Circuit in *Berger*.[14]

The Fourth Circuit's qualified immunity standard requires a level of specificity in an articulation of a constitutional right that this Court has rejected. *Anderson v. Creighton*, 483 U.S. 635 (1987), addressed the question of how particularly defined a right must be in order for it to be "clearly established":

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of preexisting authority the unlawfulness must be apparent.

14. *See also Martin v. Heideman*, 106 F.3d 1308, 1312-13 (6th Cir. 1997) (reversing district court decision that law on excessively forceful handcuffing was not clearly established, and referring instead to "the general excessive force rubric"); *Bonitz v. Fair*, 804 F.2d 164, 172 (1st Cir. 1986) ("For a legal norm to be clearly established, it does not require 'specific judicial articulation.' "); *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ("[T]o require a prior Supreme Court holding on the particular facts of this case would not only immunize but actually reward the government for inventing and pursuing ever more egregious conduct. Indeed, there never could be such a ruling from the Court, because *Harlow* would always immunize government actors.")

Id. at 640 (citations omitted). In *United States v. Lanier*, 117 S. Ct. 1219 (1997), the Court directly addressed the question whether the right that has been defined in general terms, and applied in only factually distinguishable circumstances, can nonetheless clearly establish the law. The Court held that it can.[15] *Lanier* expressly rejected the Sixth Circuit's standard in that case, which was essentially identical to the court of appeals' standard in this case.

Lanier explained that "notable factual distinctions between the precedents relied on" and the cases before the court are acceptable "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 1227. This Court added that "general statements of the law are not inherently incapable of giving fair and clear warning," and "a general constitutional rule already defined in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* The Court condemned the court of appeals' demand for factually analogous precedents, stating that "all that can usefully be said" is that liability may be imposed only if "in light of clearly established law the unlawfulness is apparent." *Id.* at 1228 (quoting *Anderson*, 483 U.S. at 640). The court of appeals' requirement in this case that petitioners point to precedent construing their Fourth Amendment rights in the context of press not authorized by warrant accompanying police officers into private homes for newsgathering purposes squarely conflicts with *Anderson* and *Lanier*.

15. *Lanier* arose in the context of a criminal prosecution under 18 U.S.C. § 242, which establishes criminal liability for willful violations of constitutional rights. In defining the level of specificity required in order to fulfill the due process requirement of "fair warning," *Lanier* expressly equated the Section 242 standard with the "clearly established" standard under qualified immunity law. *Lanier* was issued after the panel decision below and relied upon by petitioners in their Suggestion for Rehearing In Banc. Although rehearing was granted, the court ultimately ignored *Lanier* in its decision.

The qualified immunity holding of *Ayeni* is in harmony with *Anderson* and *Lanier* and directly at odds with the holding in this case. Both this case and *Ayeni* recognize in similar language the same clearly established rule. *Compare Ayeni*, 35 F.3d at 686 (holding invitation to media unconstitutional because "law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant") *with* App. 10a (sustaining invitation to media as not clearly unconstitutional despite recognition that

> if officers permit[ ] third parties who [are] not expressly authorized by the warrant and who [are] not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence

they have violated the resident's Fourth Amendment rights). Rather than grant immunity for want of a case similar at a high level of factual specificity, *Ayeni* asked whether a reasonable officer would have understood that the press was unauthorized by the warrant. The answer was yes because it was clear that there was no express authorization, and implied authorization could not reasonably have been believed to exist because it was obvious that the press were not assisting in carrying out a purpose related to the execution of the warrant. 35 F.3d at 686. The Ninth Circuit's approach mirrors that of *Ayeni* and likewise resulted in a finding that clearly established law prohibited such conduct.

What happened here was so obviously unconstitutional that no reasonable officer could have thought otherwise. The very reason for the warrant clause was to put an end to general warrants that had allowed government officials to rummage

through citizens' homes for no legitimate purpose. The news reporters here were "snooping around, looking around" for information and photographic images not mentioned in any warrant and not related to any law enforcement purpose. App. 38a-39a. Since all of the respondents understood this, they cannot seriously claim that a reasonable officer in their shoes would not have known that his actions violated a clearly established right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — IN BANC DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 8, 1998

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-1185

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

Plaintiffs-Appellees,

v.

HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOSEPH L. PERKINS; JAMES A. OLIVO,

Defendants-Appellants,

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; ERIC E. RUNION; MARK A. COLLINS; BRIAN E. ROYNESTAD,

Defendants.

Appendix A

No. 96-1188

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

Plaintiffs-Appellees,

v.

MARK A. COLLINS; ERIC E. RUNION; BRIAN E. ROYNESTAD,

Defendants-Appellants,

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; JOSEPH L. PERKINS; JAMES A. OLIVO,

Defendants.

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge.
(CA-94-1718-PJM)

Argued: March 3, 1998

Decided: April 8, 1998

Appendix A

Before WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

* * *

OPINION

WILKINS, Circuit Judge:

Charles H. Wilson and Geraldine E. Wilson (the Wilsons)[1] brought this action against federal and state law enforcement officers and others not pertinent to this appeal. The Wilsons allege that their Fourth and Fourteenth Amendment rights were violated when officers entered their home and sought to execute an arrest warrant for their son. *See* 42 U.S.C.A. § 1983 (West 1994); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971). The district court granted summary judgment in part in favor of the officers, but refused to do so on the Wilsons' claim that the officers violated the Fourth Amendment by permitting two newspaper reporters to accompany them into the Wilsons' home and photograph the officers' attempt to execute the arrest warrant. The officers appeal from the decision of the district court denying them qualified immunity with respect to this claim. We reverse.[2]

1. Raquel Wilson joined the Wilsons as a plaintiff in this action on behalf of her daughter Valencia Snowden, the Wilson's grandchild who was present during a portion of the actions that form the basis of this lawsuit. For ease of reference, however, we refer only to the Wilsons as prosecuting this litigation.

2. A panel of this court earlier issued a decision reversing the district court. *See Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997). A majority of the judges in active service subsequently voted to consider this appeal en banc. After this hearing, a majority of the judges in active service voted to rehear this appeal en banc.

Appendix A

I.

The material facts are not disputed. On April 14, 1992, federal and state law enforcement agents were engaged in a joint effort to apprehend fugitives with a history of armed, violent, criminal conduct. A team composed of Joseph L. Perkins and James A. Olivo of the United States Marshals Service and Mark A. Collins, Brian E. Roynestad, and Eric E. Runion of the Montgomery County, Maryland Sheriff's Department was formed to execute an outstanding arrest warrant. The warrant stated:

> THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETINGS: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON IF HE/SHE BE FOUND IN YOUR BAILIWICK
>
> . . . .

J.A. 124. In addition, two newspaper reporters, one outfitted with a stillshot camera, were to accompany the officers to observe and chronicle the execution of the warrant.[3] The reporters' participation was part of a two-week, news-gathering activity by the newspaper.

During the early morning hours, the officers proceeded to the address listed in police reports, as well as probation and court records, as the fugitive's home. Upon entering the residence, the officers encountered a man dressed only in undergarments who was very angry because of the intrusion. The confrontation between the man and the officers ultimately resulted in the officers

3. At the time, the United States Marshals Service had adopted a written policy permitting members of the news media to "ride along" with its law enforcement officers in order to observe and record operational missions.

Appendix A

subduing the man on the floor. In the meantime, a woman dressed in a sheer nightgown emerged from the back of the house. These two individuals were later identified as the Wilsons. The subject of the warrant, the Wilsons' son, was not present. Throughout these events, the reporters observed and photographed what transpired.[4]

The Wilsons subsequently brought this action against the federal and state officers who comprised the arrest team that entered their home; the team's supervisor, Harry Layne; and others not pertinent to this appeal. The Wilsons asserted that their constitutional rights under the Fourth and Fourteenth Amendments were violated by the officers' actions in three ways: (1) the officers used excessive force in attempting to execute the arrest warrant; (2) the officers lacked probable cause to believe that the fugitive would be found at the Wilsons' home; and (3) the officers permitted representatives of the media to enter the Wilsons' home to observe and photograph the execution of the arrest warrant. Ruling on the officers' motion for summary judgment, the district court dismissed the allegations of excessive force and lack of probable cause, concluding that the evidence viewed in the light most favorable to the Wilsons demonstrated that the amount of force the officers employed was reasonable and that the officers possessed probable cause to believe that the fugitive they sought would be found at the Wilsons' home. However, the district court rejected the officers' assertions that allowing the reporters to enter the Wilsons' home without their consent did not violate their constitutional rights. Furthermore, the district court refused to accept the officers' alternative argument that, at a minimum, they were entitled to qualified immunity because in April 1992, the law was not clearly established that permitting members of the media to accompany law enforcement officers into a private

4. These photographs have never been published.

residence during the execution of an arrest warrant was unconstitutional. The officers appeal this latter ruling.[5]

II.

A.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g.*, *Harlow v. Fitzgerald* , 457 U.S. 800, 818 (1982); *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (en banc). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* , 475 U.S. 335, 341 (1986). It protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only "for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest. *See Anderson v.*

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5. The district court denied the Wilsons' request to certify for immediate appeal its rulings with respect to the allegations of excessive force and lack of probable cause to permit those issues to be considered in conjunction with the appeal of the question of the officers' entitlement to qualified immunity. As a result, the only issue pending before us is the qualified immunity inquiry. And, because the facts are undisputed, this question presents a purely legal inquiry into whether the law was clearly established when the underlying events occurred. Thus, we may properly consider this appeal. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Winfield v. Bass*, 106 F.3d 525, 528-30 (4th Cir. 1997) (en banc).

Creighton, 483 U.S. 635, 640 (1987); *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992) (explaining that "[t]he fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless 'clearly established' for qualified immunity purposes" and that " '[c]learly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked"). The law is clearly established such that an officer's conduct transgresses a bright line when the law has "been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980); *see Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997) (explaining that "[o]rdinarily, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent"), *petition for cert. filed* , 66 U.S.L.W. __ (U.S. Feb. 19, 1998) (No. 97-1342); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (en banc) (explaining that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, [the] Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose"), *cert. denied*, 118 S. Ct. 412 (1997).

In analyzing an appeal from the rejection of a qualified immunity defense, our first task is to identify the specific right that the plaintiff asserts was infringed by the challenged conduct. *See Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). The court then must consider whether, at the time of the claimed violation, that right was clearly established and " 'whether a reasonable person in the official's position would have known that his conduct would violate that right.' " *Id.* (quoting *Gordon v. Kidd*, 971 F.2d

1087, 1093 (4th Cir. 1992)). Our review of the denial of summary judgment based on qualified immunity is de novo. *See Pritchett*, 973 F.2d at 313.

B.

The constitutional right that the Wilsons claim the officers violated, defined at the appropriate level of specificity, is their Fourth Amendment right to avoid unreasonable searches or seizures resulting from the officers' decision to permit members of the media who were not authorized to execute the warrant to enter into a private residence, without the homeowners' consent, to observe and photograph the execution of an arrest warrant. The question before us, then, is whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it.

The Fourth Amendment provides in pertinent part, "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. By 1992, the Supreme Court had ruled that an entry into a home without a warrant is per se unreasonable unless an exception to the warrant requirement, such as exigent circumstances, exists. *See Payton v. New York*, 445 U.S. 573, 588-90 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). And, it is equally well settled that an officer executing a warrant is limited to those actions expressly authorized by the warrant, *see Bivens*, 403 U.S. at 394 n.7, or implicitly authorized because they are reasonable to advance a legitimate law enforcement purpose relating to the warrant or to ensure the officer's or the public's safety, *see Michigan v. Summers* , 452 U.S. 692, 705 (1981). *See also Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) (explaining that "because the

touchstone of the constitutionality of an officer's conduct during a search is reasonableness, when executing a search warrant, an officer is limited to conduct that is reasonably necessary to effectuate the warrant's purpose").

Here, the officers entered the Wilsons' home pursuant to a valid arrest warrant. The officers did not exceed the scope of the warrant by permitting the reporters who accompanied them into the Wilsons' home to engage in activities that the officers could not themselves have undertaken consistent with the warrant. Specifically, the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been permitted to go in executing the arrest warrant. Further, the reporters' photographs of the events did not amount to a seizure. The Supreme Court has indicated that a seizure occurs only when there has been a "meaningful interference with an individual's possessory interests in . . . property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (recording the serial numbers on equipment "did not meaningfully interfere with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure" (internal quotation marks omitted)). *But see Ayeni v. Mottola*, 35 F.3d 680, 688 (2d Cir. 1994). An application of this definition indicates that the photographic images captured by the reporters were not seized within the meaning of the Fourth Amendment. But, just as importantly for our purposes, it certainly was not clearly established that photographing an arrest constituted a seizure of the images recorded. Thus, reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities

in which they themselves could have engaged consistent with the warrant.

Furthermore, even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule. When this incident took place in 1992, there was no clear law from the Supreme Court, this court, or the Court of Appeals of Maryland establishing that permitting reporters to observe and photograph the events surrounding the execution of an arrest warrant may not serve a legitimate law enforcement purpose related to execution of the warrant. And, reasonable law enforcement officers might conclude that permitting media representatives to observe and photographically record the execution of an arrest warrant does serve such a purpose. For example, the purpose may be served by affording protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions. Additionally, it could be asserted that facilitating accurate reporting that improves public oversight of law-enforcement activities is a legitimate law enforcement purpose because it deters crime, as well as improper conduct by law enforcement officers. In any event, we conclude that reasonable law enforcement officers could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related to the execution of the warrant.

The dissent acknowledges that neither the Supreme Court nor this court had in 1992 addressed whether law enforcement

officers violate the Fourth Amendment by permitting media representatives to accompany them into a private residence to observe and photograph the officers' execution of an arrest warrant. The dissent nevertheless contends that our conclusion that the officers are entitled to qualified immunity is erroneous, asserting that it was clearly established that the Fourth Amendment prohibited government agents from bringing a private citizen into a home to conduct an independent search or seizure. In support of its argument, the dissent points to the decision of this court in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995),[6] and to those of three other courts of appeals holding on facts similar to those

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6. In *Buonocore*, an opinion decided long after the events at issue here, officers allowed a security guard to enter a private residence and conduct an independent search for property not authorized by a warrant. *Buonocore*, 65 F.3d at 350-51. In the appeal from the denial of summary judgment to the officers, we characterized the issue presented as whether it was clearly established on November 24, 1992 that "Fourth Amendment law prohibited government agents from bringing a private citizen into Buonocore's home to conduct an independent, general search for items not identified in any warrant." *Id.* at 353 (internal quotation marks omitted). And, we held that it was, reasoning:

> [W]e have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not reasonable. It obviously exceeds the scope of the required specific warrant and furthermore violates the sanctity of private dwellings.

Id. at 356 (internal quotation marks omitted). *Buonocore*, therefore, addressed the question of whether a third party, who is not authorized by the warrant to conduct a search, may accompany law enforcement officers in executing a warrant and undertake an independent search for items not described in the warrant. Of course, the officers here permitted no such general independent search by the reporters.

at issue here that officers were not entitled to qualified immunity, *see Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997);[7] *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994);[8] *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992).[9]

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7. In *Berger*, decided more than five years after the events at issue here, the Court of Appeals for the Ninth Circuit ruled that officers who permitted media representatives to accompany them in executing a search warrant for a private purpose not related to law enforcement efforts in 1993 were not entitled to qualified immunity. *See Berger*, 129 F.3d at 510-12.

8. In *Ayeni*, decided in 1994, the Court of Appeals for the Second Circuit held that it was clearly established in March 1992 that officers violated the Fourth Amendment when they permitted a television crew to enter a private residence and film the execution of a search warrant that provided no authorization for their presence. *See Ayeni*, 35 F.3d at 684-86. The court reasoned that although there were no decisions expressly holding that searching agents violate the Constitution by bringing members of the press into a home to observe and report on their activities, it had

> long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

Id. at 686. Furthermore, the court held that an objectively reasonable officer could not have failed to appreciate "that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was [not] in accordance with Fourth Amendment requirements." *Id.*

9. In *Bills*, which was decided approximately one month prior to the incident under review, the court held that law enforcement officers may violate
(Cont'd)

The decisions on which the dissent relies, however, do not persuade us that the officers are not entitled to qualified immunity. Reliance on decisions issued after the events underlying this litigation, whether the decisions were decided by this court or others, is inappropriate. *See Mitchell v. Forsyth*, 472 U.S. 511, 533-35 (1985). Certainly law enforcement officers need not correctly anticipate future constitutional rulings on pain of personal liability. Further, as noted above, reliance on decisions from other circuits to determine that a given proposition of law is clearly

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(Cont'd)
the Fourth Amendment by permitting a security guard to accompany them into a private residence to execute a search warrant and to engage in an independent search for items that were not described in the warrant. *See Bills*, 958 F.2d at 702-05. The court explained:

> [W]here an intrusion is justified, whether by warrant or by probable cause and exigent circumstances, police are temporarily placed in control of the premises and its occupants. It is as though the premises were given to the officers in trust for such time as may be required to execute their search in safety and then depart. Officers in unquestioned command of a dwelling may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises. The warrant in this case implicitly authorized the police officers to control and secure the premises during their search. . . . It did not implicitly authorize them to invite a private security officer to tour plaintiff's home for the purpose of finding [evidence not specified in the search warrant]. . . .

Id. at 704-05 (internal quotation marks omitted). Based on this reasoning, the Court of Appeals for the Sixth Circuit held that the officers' conduct presented a jury question concerning whether the officers had exceeded the scope of the search warrant and remanded for further proceedings. *See id.* at 705.

established is inappropriate as a general matter, and we find no basis to depart from the general rule in this instance. Thus, the decisions of the other circuit courts of appeals cannot support a conclusion that the law was clearly established in our circuit. And finally, subsequent to the events giving rise to this litigation, at least one other court of appeals has held on similar facts that law enforcement officers *were* entitled to qualified immunity. *See Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). Relying on the dearth of authority holding the conduct in question to be violative of the Fourth Amendment, the existence of decisions holding that these types of actions by law enforcement officers did not transgress constitutional principles,[10] and the lack of Supreme Court direction on the question, the *Parker* court held that officers were entitled to qualified immunity. *See id.* Given that reasonable jurists can differ on this question, we cannot say that the law was so clear that a reasonable officer must have known his actions transgressed constitutional bounds.

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10. Early cases considering the constitutionality of law enforcement officers allowing members of the media to enter a private residence to observe or record the execution of a warrant are scarce. The few decisions that we have located on this issue are uniform in concluding that such conduct does not violate constitutional principles. *See Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984) (rejecting argument that police violated the Fourth Amendment by permitting media to enter home and film arrest on the basis that no protected privacy interest was violated); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980) (declining to accept plaintiff's assertion that officers violated his constitutional rights by inviting the press to be present during the execution of a search warrant at his residence); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) (rejecting claim that officers infringed the Fourth Amendment by allowing a television reporter to enter plaintiff's property and film search, reasoning "that the filming and television broadcast of a reasonable search and seizure, without more, [do not] result in unreasonableness").

In asserting that no reasonable officer could have believed that the reporters were serving a legitimate law enforcement purpose, the dissent misunderstands the distinction between the reporters' aid in the actual execution of the warrant and other legitimate law enforcement purposes that the reporters may have facilitated by accompanying the officers to observe and record the attempt to execute the warrant. The dissent equates these two distinct concepts, assuming that unless, as a matter of historical fact, the officers intended for the reporters actually to assist in the execution of the arrest warrant, reasonable officers must have known "full well that the reporters served no legitimate law enforcement purpose." Dissent at 27. In support of its argument that the officers did not intend for the reporters to aid in the actual execution of the warrant, the dissent quotes a portion of the statement of the facts in the panel opinion, which observed that the reporters accompanied the officers as part of a two-week news gathering operation that was not designed to serve a law enforcement purpose. The dissent also relies on a portion of the officers' brief in which they acknowledge that the reporters "were not involved in executing the warrant" but instead were "mere bystanders." *Id.* at 27 (internal quotation marks omitted).

While it is undoubtedly true that neither the reporters nor the officers envisioned that the reporters would provide assistance to the officers in actually executing the arrest warrant, it is equally true that reasonable officers may have perceived that permitting the reporters to accompany them served a legitimate law enforcement function. Indeed, the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest. Further, reasonable officers may have believed that the obvious increase to their safety afforded

by the presence of the reporters constituted a legitimate law enforcement purpose.[11] Moreover, the dissent overlooks that although the officers have readily acknowledged that there was no intent that the reporters aid in the execution of the warrant, the officers consistently have maintained that it was reasonable to believe that the reporters' presence served a legitimate law enforcement purpose:

> [I]t is in fact a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because *both* the deterrence of crime *and* the deterrence of improper conduct by law-enforcement officers are vital to the broader mission. The formal policy of the United States Marshals Service . . . was directed to these ends.

Reply Brief of Appellants at 6-7 (footnote omitted).

Because the dissent fails to understand the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose, the dissent incorrectly concludes that no reasonable law enforcement officer who knew the former could believe the latter. Rather, in our view, a reasonable law enforcement officer apprised of the fact that the officers did not intend for the reporters to assist in actually executing the warrant nevertheless reasonably

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11. Of course, we do not hold that these purposes actually justified the reporters' presence while the warrant was executed; we merely hold that in the absence of clearly established law holding that they were not adequate to warrant their presence, reasonable officers may have believed them to be.

could have concluded that permitting the reporters to accompany them while executing the warrant served a legitimate law enforcement purpose.

III.

We stress that we do not address whether the officers' conduct was constitutional or appropriate, only whether the legal landscape when these events occurred was sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative of the Fourth Amendment. Because in April 1992 it was not clearly established that permitting media representatives to accompany law enforcement officers into a private residence to observe and photograph their attempt to execute an arrest warrant would violate the homeowner's constitutional rights, we hold that these officers are entitled to qualified immunity. Consequently, we reverse the decision of the district court refusing to grant summary judgment in favor of the officers.

REVERSED

WIDENER, Circuit Judge, concurring:

I concur in the result obtained by the majority.

I also concur in all of the majority opinion except the four sentences commencing with "and" on page 9, line 15, and ending with "warrant" on page 9, line 29. The conclusion there mentioned is not a question before us, and I would not express an advisory opinion upon it.

Appendix A

MURNAGHAN, Circuit Judge, dissenting:

News media (principally newspapers, journals, magazines, television and radio) have an abiding interest in collecting information and observing events connected with such information whenever they occur. The media most naturally find criminal activities and steps to punish the perpetrators fascinating to their readers, viewers and listeners. What goes on in court or what brings matters to court are high on the media's list of matters of interest. Understandably media devote much attention to the arrest of those accused of crime and a photograph of one being so arrested would be much desired by the media.

Not surprisingly, riding along with the police is regarded as a most valuable method of securing photographs and interviews with those sought by the police. Riding along causes few legal problems when done on the street or in other public places. However, some of the most interesting arrests occur in private locations, especially private homes. An intrusion into a home necessitates, in virtually every case, a warrant from a judicial officer, except where one of a few specifically established and well-delineated exceptions applies. When requested, such a warrant in virtually every case is issued to the police.

On April 14, 1992, Judge Ruben of Maryland's Sixth Judicial Circuit issued three warrants for the arrest of Dominic Jerome Wilson. The warrants were addressed "to any duly authorized peace officer." The warrants made no mention of where the arrest was to take place nor of joining a news reporter or a photographer to the team executing the warrant nor of the need for such person's assistance in the police execution of the warrant. Nevertheless, the team of Deputy U.S. Marshals and Montgomery County police officers (hereinafter "the police" or "the officers") invited a

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newspaper reporter and photographer seeking a story to accompany the police during the execution of the warrant. The police allowed the reporters to enter the private home of Dominic Jerome Wilson's parents without their permission, to observe the execution of the warrants issued to the police, and to photograph the Wilsons in a state of undress and under humiliating circumstances.

It has long been established that a police officer executing a warrant is limited to those actions "strictly within the bounds set by the warrant," *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971), or reasonably necessary for its execution, *see Michigan v. Summers*, 452 U.S. 692, 705 (1981). The police officers violated these clearly established Fourth Amendment principles when they invited newspaper reporters to enter a private home and photograph the residents for purely commercial newspaper purposes during the execution of an arrest warrant. The reporters were not there to involve themselves in such execution. The ride-along policy of the Department of Justice by which it was attempted to justify their presence stated that the reporters riding along were there to see and record what actually happens. Nevertheless, the *en banc* majority grants the officers immunity for their actions in permitting the reporters' invasion of the privacy of the home to which the Wilsons were entitled. The majority presents post-hoc rationalizations to support its assertion that the defendants could have believed that inviting the reporters into the home was reasonably necessary to serve the purposes of the arrest warrants. Such a ruling seeks to convert qualified immunity to absolute immunity.[1]

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1. The majority has not argued that an exception to the warrant requirement justified the search. *See Mincey v. Arizona*, 437 U.S. 385, 390 (1978) ("The (Cont'd)

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No reporters' presence was mentioned in the warrants, and there were no exigent circumstances justifying warrantless action. Because no reasonable police officer could have believed that inviting the reporters into the home or allowing the photographer to take pictures either was authorized by the warrant or was reasonably necessary to accomplish its legitimate law enforcement purposes, the police officers' actions amounted to unreasonable searches and seizures in violation of clearly established Fourth Amendment law. I vigorously dissent.

I.

At 6:45 on the morning of April 14, 1992, a team of deputy U.S. Marshals and Montgomery County Police Officers entered the home of Charles and Geraldine Wilson. The officers were there to execute arrest warrants for Dominic Wilson, the Wilsons' adult son. It is to be emphasized that the police and deputy Marshals had no further powers conferred on them by the arrest warrants and no mention was made in the warrants of media presence.

(Cont'd)
Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' " (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) (explaining that, to justify a warrantless search for the subject of an arrest warrant in the home of a third party, "not only must the officers have probable cause to believe the person named in the arrest warrant is on the premises of the third person, but there must also exist an appropriate exception to the warrant requirement," such as "exigent circumstances"). Clearly no such exception was "specifically established and well delineated."

Appendix A

Pursuant to the U.S. Marshals' Ride-Along policy, they had invited a reporter and a photographer from the *Washington Post* to accompany them on their mission.[2] The policy explained that "ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens." The police officers concede that the reporters "were not involved in executing the warrant," Brief of Appellants at 8, 12, but were "mere bystanders," *id.* at 8.[3] Although the policy instructed the Marshals to "establish ground rules" with the reporters, including "what can be covered with cameras and when, [and] any privacy restrictions that may be encountered," the officers exercised no control over the reporters or what they photographed, even once inside the Wilsons' private home.

The Wilsons were lying in bed that morning when they heard a commotion. Mr. Wilson, dressed only in his undershorts, got up to investigate and found a team of armed plainclothes officers, accompanied by the reporters, in his living room. The officers subdued Mr. Wilson, who was angry because of the intrusion. When Mrs. Wilson came out of the bedroom, wearing only a sheer nightgown, she saw a police officer holding a gun to her husband's head, pinning him face down on the floor in his

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2. There was no equivalent Montgomery County Sheriff's Department ride-along policy. In fact, Raymond M. Kight, Sheriff of Montgomery County, believed that it would be a violation of the constitutional rights of a homeowner to bring a civilian on a ride-along program into a private home, unless the civilian were there as a witness to identify someone or served some other legitimate purpose related to the execution of the warrant.

3. Even if photographs had been reasonably necessary to accomplish the purpose of the warrant, allowing a member of the news media to take the photographs was not; the police could have brought along a camera and snapped a picture themselves.

undershorts. The news team observed and took photographs throughout these events.

The Wilsons filed suit against the Montgomery County police officers, the Deputy U.S. Marshals, their supervisor and others. They alleged that their Fourth Amendment rights were violated by the officers' inviting the reporter and photographer to accompany them into the Wilsons' home and to observe and photograph during the attempt to execute the arrest warrant. The defendants' assertion of qualified immunity was rejected by the district court, then brought to us on interlocutory appeal. A divided panel of this court reversed the district court, holding that the officers were entitled to qualified immunity.

This rehearing *en banc* followed.

II.

A.

We must not, when arguing whether some specific incarnation of Fourth Amendment rights was or was not clearly established, lose sight of the core values that the Fourth Amendment was designed to protect. That amendment is "an American extension of the English tradition that a man's house [is] his castle." William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution* , 37 Wm. & Mary Q. 371, 400 (1980). "The belief that 'a man's house is his castle' found expression at least as early as the sixteenth century" in English jurisprudence. *Id.* at 371.

In *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1604), the King's Bench resolved that "the house of every one is to him as his castle and fortress," *id.* at 195, and prohibited the government from forcibly entering a home at the behest of a private party, *id.* at 198. Although *Semayne's Case* accepted broad powers of search in cases where the government was a party, Lord Coke (who witnessed *Semayne's Case* as attorney general) later applied its adage that a man's house was his castle to curtail the arbitrary government invasion of private homes. *See* Cuddihy & Hardy, *supra*, at 376. William Pitt elaborated upon the sanctity of the home in his impassioned defense of private homeowners against discretionary government searches before Parliament in 1766. *See id.* at 386.

> The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Id. And William Blackstone, in his *Commentaries* wrote:

> And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private.

William Blackstone, 4 *Commentaries on the Laws of England* 223 (1769).

These principles are embodied in the Fourth Amendment of the United States Constitution: "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated. . . ." As Justice Stewart wrote for the Supreme Court in *Silverman v. United States*, 365 U.S. 505 (1961):

> The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 *Howell's State Trials* 1029, 1066; *Boyd* v. *United States*, 116 U.S. 616, 626-30 . . . . William Pitt's eloquent description of this right has been often quoted. The late Judge Jerome Frank made the point in more contemporary language: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty — worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *United States* v. *On Lee*, 193 F.2d 306, 315-16 (dissenting opinion).

Id. at 511 & n.4. Today's majority opinion undermines the right at the very core of the Fourth Amendment and sanctions an "unreasonable governmental intrusion."

B.

"[G]overnment officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is critical to define the rights being examined at the appropriate level of specificity. *See DiMeglio v. Haines*, 45 F.3d 790, 803-04 (4th Cir. 1995). If the right is defined too broadly, it will always be found to have been clearly established. For example, it is clearly established that the deprivation of property without due process of law violates the Fourteenth Amendment. On the other hand, if the right is defined too narrowly, no proposition will ever be found to be clearly established. For example, probably no case will have held that the exact acts in question regarding the exact parties in contention under the exact circumstances presented is a constitutional violation.

For the right allegedly violated to be clearly established, it is not necessary that "the very act in question ha[ve] previously been held unlawful"; rather "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the unlawfulness is apparent, the fact that some courts may have reached an incorrect result will not shield a defendant's violation of a clearly established right. *See Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993) (finding that a right was clearly established despite an unpublished district court case that had not recognized the right).

C.

The government's right to intrude upon the privacy of the home is narrowly circumscribed by the Fourth Amendment's

prohibition against unreasonable searches and seizures. The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 589-90 (1980) (citation omitted) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) (alterations in original). Similar language is omnipresent in the Supreme Court's Fourth Amendment jurisprudence. *See, e.g.*, *Winston v. Lee*, 470 U.S. 753, 761-62 (1985) (explaining that "[i]ntruding into an individual's living room" to conduct a search "damage[s] the individual's sense of personal privacy and security and [is] thus subject to the Fourth Amendment's dictates").

Unless a search is supported by a warrant or a specific exception to the warrant clause, it is per se unreasonable, and therefore unconstitutional. *See Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971) ("[S]earches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' "). The arrest warrant in this case was addressed "to any duly authorized peace officer." It made no mention of a news team or of a photographer, or of any private individuals to be invited into another's private home. Nor is there any claim that exigent circumstances or some other exception to the warrant clause excused the Montgomery County Circuit Court's failure to allude to a reporter or photographer.

Even when a valid warrant authorizes entry into a private home, a police officer is limited to those actions explicitly named in the warrant. *See Bivens*, 403 U.S. at 394 n.7 ("[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant. . . ."); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995). The reasonableness of a search or seizure depends in part on how it is carried out. *See Graham v. Connor*, 490 U.S. 386, 395 (1989).

A warrant may imply some limited authority to take actions not explicitly mentioned in it, but reasonably necessary to further its purposes. *See Summers*, 452 U.S. at 705 (holding that a search warrant for a home carries the implied authority to detain its occupants); *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997). For example, "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603. This authority is implied because "[i]f there is sufficient evidence of a citizen's participation

in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* at 602-03.

Because the media presence here served no legitimate law enforcement function, but rather was intended solely to gather news to profit the *Washington Post*, the arrest warrant did not carry with it the implied authorization to invite the media into a private house.[4] The reporter and photographer "were not involved in executing the warrant," but were "mere bystanders." Brief of Appellants at 8. The district court found that the reporters were "not serving any legitimate law enforcement purposes." (transcript of hearing on summary judgment motions). A warrant does not carry with it the authority to bring along mere bystanders to observe for their own commercial purposes.

Even if we only consider cases from the Supreme Court, the Fourth Circuit Court of Appeals, and the Court of Appeals of Maryland, the principles recounted above were all clearly established by the time of the search in April 1992. In addition, by March of 1992, one circuit court had explained that officers searching a private residence pursuant to a warrant might unconstitutionally "exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises." *Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992). And it has been established in the common law since the early 1600's that "[e]ven a duly authorized officer could not execute a

4. An intrusion into a private home is entirely different from a situation where ride-along reporters accompany police officers or cameras are mounted on police cars on a public street. Those situations do not involve the reasonable expectation of privacy inherent in a home invasion.

warrant to further the purposes of a private individual." *Buonocore*, 65 F.3d at 354 (citing *Semayne's Case*, 77 Eng. Rep. 194, 198 (K.B. 1604); *Burdett v. Abbott*, 104 Eng. Rep. 501, 560-61 (K.B. 1811)).

The Supreme Court jurisprudence, circuit court precedent and long-standing principles of common-law discussed above were not made any less clear by the fact that two unpublished district court opinions had concluded that inviting the news media to observe the execution of a search warrant within a private home did not violate any federally protected right. *See Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984) (holding that plaintiffs had "alleged no facts to show a search was unreasonable," nor had they stated a claim for violation of any other federally protected right to privacy);[5] *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980) (rejecting a plaintiff's claim of deprivation of federally protected privacy rights *without addressing the Fourth Amendment*). We have previously observed that "[s]ince unpublished opinions are not even regarded as binding precedent in our circuit, such opinions cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity."[6] *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir.), *cert.*

5. Despite *Moncrief*'s holding, the entry by the news media, without mention in the warrant, was plainly unreasonable in Fourth Amendment terms.

6. It seems logical that repeated decisions refusing to recognize a right would be evidence that the right was not clearly established even if the opinions were unpublished. However, it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law. For this reason we are loathe to cite to unpublished opinions, *see* Local Rule 36(c), nor will we consider them to be evidence that a right is or is not clearly established.

denied, 117 S. Ct. 408 (1996). More importantly, neither of the unpublished district court cases squarely addressed the claim made by the Wilsons, that police violate the Fourth Amendment when they invite reporters who are not mentioned in the warrant nor reasonably necessary to its execution to accompany them into a private home, without the consent of the homeowner. In *Moncrief* the court only addressed procedural challenges to the execution of the warrant (such as its timing) in rejecting the plaintiffs' Fourth Amendment claim. *See Moncrief*, 10 Med. L. Rep. at 1621. And the court in *Higbee* never considered the Fourth Amendment at all. *See Higbee*, 5 Med. L. Rep. at 2372-73. Neither case endorses or approves of the actions here complained of; they never discuss the issue at all. Such unpublished cases amount to no precedent whatsoever, and cannot render a defendant immune from liability for the violation of a clearly established law. *See Jones*, 7 F.3d at 1362 (finding that a right was clearly established, despite an unpublished district court case that had not recognized the right); *compare Ayeni v. Mottola*, 35 F.3d 680, 684-86 (2d Cir. 1994) (holding that it was clearly established in 1992 that officers violated the Fourth Amendment when they allowed a television crew to film the execution of a search warrant (which made no mention of their presence) at a private residence), *cert. denied*, 514 U.S. 1062 (1995), *with Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1995) (observing that no such right was clearly established because most cases that had addressed the question had found no constitutional violation, citing unpublished cases but ignoring broader principles of Fourth Amendment law), *cert. denied*, 117 S. Ct. 1081 (1997).

In addition to the unpublished cases, the majority notes that an intermediate appellate court in Wisconsin has faced a similar issue. That court in 1980 was "unwilling to accept the proposition

that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness," where "neither the search . . . nor the film or its broadcast has been shown to include intimate, offensive or vulgar aspects." *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980). Unlike that case, here the search and photography clearly involved intimate aspects — Mr. Wilson was held at gunpoint in his underwear and Mrs. Wilson was photographed in only a sheer nightgown. Thus *Prahl* offers no solace to these defendants.[7]

It was manifest to any reasonable officer in 1992 (indeed before that date) that he had to strive to minimize the substantial intrusion upon privacy that accompanies the execution of a warrant in a private home. The Supreme Court has warned that "responsible officials, including judicial officials, must take care to assure that [searches and seizures that may reveal innocuous, private information] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Here the police officers *maximized* the intrusion upon the privacy of the parents' home during a search for their son, by holding the innocent occupants of the home at gunpoint while members of the media photographed them in their underwear. The officers could hardly have done more

7. Even had *Prahl* been directly supportive of the officers' actions, its erroneous conclusion could not immunize them from liability for violation of clearly established law. Although we have in the past held that a single state court of appeals case to the contrary "alone suffice[d] to show that [a recently recognized right] had not theretofore been clearly established." *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991), in that case the newly recognized tax holding did not have the clear constitutional pedigree of the right the Wilsons assert, *see id.* at 968 (holding that the right not to be discriminatorily taxed was not clearly established because "[t]he most pertinent judicial decisions had upheld comparable taxing schemes and the doctrine of intergovernmental tax immunity was, at best, ambiguous").

violence to the well-established Fourth Amendment principles recounted above.

D.

The majority does not disagree with the conclusion that

> in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence. . . .

Majority opinion at p. 9. The majority nevertheless has asserted that because there was "no clear law . . . establishing that permitting reporters to observe and photograph the events surrounding the execution of an arrest warrant *may not* serve a legitimate law enforcement purpose related to execution of the warrant," a reasonable law enforcement officer might have concluded that permitting the reporters in this case to observe and photograph *did* serve such a purpose. *Id.* at 9 (emphasis added).

The majority's argument is speculative and disingenuous at best; it may just as well have argued that, because there was no law prohibiting reporters or photographers from being authorized by the warrant, a reasonable officer might have concluded that the reporters and photographer in this case *were* authorized by the warrant. But of course, the officers knew that they were not so authorized; the warrant made no mention of reporters or photographers. Likewise, the officers knew full well that the reporters served no legitimate law enforcement purpose, and no

reasonable officer on that team could have thought otherwise. The officers recognized as much when they explained in their brief that the reporters "were not involved in executing the warrant" but were "mere bystanders." Brief of Appellants at 8. The panel opinion, in finding there was qualified immunity, stated that: "[t]he reporters' participation was part of a two-week, news-gathering investigation by the newspaper; it was *not designed* to serve any legitimate law enforcement purpose." 110 F.3d 1071, 1072 (4th Cir. 1997) (emphasis added).[8]

The news gathering team was part of a two week investigation to produce a story or stories about law enforcement. The police brought the team along in the hope of getting some good press; that is all. The majority's suggestion that the police officers might have concluded that the reporters would "afford[ ] protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions," majority opinion at 9, is absurd.[9] The team was not brought along for this reason, and no reasonable member of the team could

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8. Interestingly, the *en banc* majority opinion leaves out the second half of that sentence. *See* majority opinion at 4.

9. Although I have cited to the passage on page 9 as the "majority opinion," it is important to note that only five of the eleven active Circuit Judges have joined this portion of the *en banc* opinion. A majority of the *en banc* court (the five dissenting Judges and Judge Widener) does not endorse the hypothetical reasons referred to as legitimate justifications for the officers' actions. Nor is the conclusion, *see* majority op. at 9 ("In any event, we conclude that reasonable law enforcement officers could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related to the execution of the warrant."), the law of our Circuit; on that point, the Circuit is evenly divided.

have believed that it was.[10] There is no evidence that the team served this or any other legitimate law enforcement purpose.

Police officers cannot justify exceeding the clear bounds of a warrant by asserting that their actions *might fortuitously* have served some legitimate purpose despite being *designed* with no such purpose in mind. The reporters might also have helped by carrying the warrant while the officers handcuffed suspects, or by holding the door open for an officer while he was carrying contraband; but to uphold the police actions because of the *potential for fortuitous assistance*, despite clearly not being designed to serve law enforcement, would make a mockery of the rule that an officer's actions are limited to the scope authorized by the warrant. *See Bivens*, 403 U.S. at 394 n.7.[11] The exceptions to this strict limitation permit only those actions reasonably necessary to accomplish the purpose of the warrant. *See Payton*, 445 U.S. at 602-03; *Summers*, 452 U.S. at 705.

It is fundamental that, when practicable, officers must obtain the approval of a neutral judicial officer, via a warrant, for any

10. This attention to the belief that the actual officers may have possessed at the time of the search "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent." *Anderson*, 483 U.S. at 641. Rather, the Supreme Court has explained that the determination of whether it was objectively reasonable for an officer to have believed that his search was lawful "will often require examination of the information possessed by the searching officials." *Id.* Our inquiry must ask whether a reasonable officer, knowing what these officers knew about the news team, could have concluded that their presence was reasonably necessary to serve the purpose of the arrest warrant.

11. Similarly, early English jurisprudence recognized that a warrant issued to officers in one jurisdiction cannot properly be executed by officers of another jurisdiction. *See Freegard v. Barnes and Barton*, 155 Eng. Rep. 1185, 1186 (Exch. 1852).

intrusion upon the Fourth Amendment privacy of an individual's home. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). If the presence of a photographer or other observer on a search in a private home would be reasonably necessary to serve a legitimate purpose, then a police officer in obtaining the warrant should explain so to the judicial officer issuing the warrant. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996) (holding that police officers were justified in bringing a television crew into a house to videotape the execution of a search warrant because "the warrant at issue [specifically] authorized 'videotaping and photographing' during the execution of the search."). Despite these settled principles, the majority's holding today allows police unilaterally to invite a reporter or anyone else to accompany them whenever entering a house, even if the warrant says absolutely nothing about allowing other parties to enter, so long as their presence might fortuitously produce some benefit to the police.[12]

E.

A proper understanding of the relationship between this case and our precedent in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), further reveals that the officers' actions violated clearly

12. The majority's holding will also undermine the rule recognized in *Buonocore*, 65 F.3d 347, discussed below, that "the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant," *id.* at 356. That private individual's presence, after all, might "afford[ ] protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of" a witness to his actions. Majority opinion at 9. By the majority's reasoning, such potential fortuitous assistance might be enough to shield an officer from liability for a clear constitutional violation.

established law. In *Buonocore*, officers executing a search warrant for illegal weapons at the plaintiff's residence invited a security officer from the plaintiff's work to attend the search and look for items possibly stolen from work (which were not mentioned in the warrant). *See id.* at 350. The plaintiff filed a *Bivens* action alleging that the officers' actions violated the Fourth Amendment, and the officers raised a qualified immunity defense. *See id.* at 351-52.

The Fourth Circuit in *Buonocore* discussed two related concepts contained within the Fourth Amendment:

> First, by mandating that "no warrants shall issue" unless they "particularly" describe "the place to be searched" and "things to be seized," the Framers prohibited the use of general warrants issuable to anyone. Second, by expressly acknowledging the substantive "right of the people to be secure in their . . . houses," the Framers recognized a person's special right to privacy, to be left undisturbed — except for reasonable searches — within his own home.

Id. at 353. After a thorough and detailed analysis, the court concluded that the officers' actions offended both aspects of the Fourth Amendment:

> In view of the "common law at the time of the framing," of the Fourth Amendment, and the Supreme Court's uniform interpretation of the Amendment's protections since that time, we have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate

> a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not "reasonable." It obviously exceeds the scope of the required specific warrant and furthermore violates the "sanctity of private dwellings."

Id. at 356 (citations omitted).

The *Buonocore* panel next asked whether these rights were clearly established at the time of the search (in November of 1992). Instead of analyzing the two elements separately, however, it combined them, holding that "[t]he right to be free from government officials facilitating a private person's general search of the sort Buonocore alleges was conducted here, is 'manifestly included' within 'core' Fourth Amendment protection." *Id.* at 357.[13] On that basis the *en banc* majority attempts to read narrowly and distinguish *Buonocore* from the situation in *Wilson*.

Today's majority recognizes that *Buonocore* holds that "it was clearly established on November 24, 1992 that 'Fourth Amendment law prohibited government agents from bringing a private citizen into Buonocore's home to conduct an independent, general search for items not identified in any warrant.' " Majority opinion at 10 n.6 (quoting *Buonocore*, 65 F.3d at 353). Of course, the reporter and photographer brought into the Wilson home were private citizens. But the majority argues that these reporters did not conduct a "general independent search," *id.*, nor was their taking of photographs a seizure, *id.* at 8-9. Neither assertion is

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13. It was not necessary at the time to discuss whether the right to be free from the police inviting third parties, who were not mentioned in the warrant and not reasonably necessary to its execution, into a private home during execution of a warrant, independent of their searching, was clearly established.

persuasive; in fact, the rights asserted by the Wilsons are analogous to those asserted by Buonocore.

First, it is clear that the reporter's and photographer's actions constituted an independent search. The district court found that

> to the extent that [the reporters] weren't [trying to aid law enforcement], they were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed by the photographer.

(transcript of hearing on summary judgment motions).

An inspection amounts to a "search" if it intrudes upon a subjective expectation of privacy that society is prepared to recognize as reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Wilsons unquestionably had a reasonable expectation of privacy in their home and in their undressed bodies vis-a-vis the reporters. The reporter's and photographer's "snooping around" and "looking around" the inside of the Wilsons' home violated that reasonable expectation of privacy. The violation was magnified exponentially by the reporter's intention to publish the story he observed to the world at large, and the photographer's taking photographs of the Wilsons' humiliating circumstances, particularly Mr. Wilson wearing only his underwear, being held prostrate on the floor with a gun to his head.[14]

14. It is immaterial that the photographs have not yet been published, except to the extent that publishing them should increase the allowable damages. They have in any event been seen by him who took them and by an editor or editors of the *Washington Post*.

Perhaps the majority believes that the Wilson search did not implicate the right recognized in *Buonocore* because "the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been permitted to go in executing the arrest warrant." Majority opinion at 8. Any attempt to distinguish the *Buonocore* search on the grounds that the *Wilson* search was not "an independent" one, however, is unavailing.[15]

The news team's search of the Wilson home was independent of the police execution of the arrest warrant in that the two parties were looking for altogether different things: the police were looking for a fugitive whereas the news team was looking for anything dramatic that might make a good story. The language in *Buonocore*

15. It is possible that the majority means to suggest that, because the officers had already seen everything that the reporters saw, the Wilsons had no remaining expectation of privacy in their home or undressed persons to be infringed by the reporters' observation. *See* Brief of Appellant at 16-17 (citing *United States v. Jacobsen*, 466 U.S. 109, 115 (1984)). Such a mechanical understanding of a reasonable expectation of privacy may be appropriate in regard to a search that reveals only information —for example, once an individual gives information to a third party, he assumes the risk that the third party will reveal the information to the authorities. *See United States v. Miller*, 425 U.S. 435, 442-43 (1976). An expectation of privacy in the shared information is not reasonable, and does not implicate the Fourth Amendment. *See id.* at 443.

But the same cannot be said for a search that intrudes on a privacy right founded as much in dignity as in secrecy. If the Wilsons had invited a guest into their home, the guest could not then have opened the door to the police to conduct a search. *Illinois v. Rodriguez*, 497 U.S. 177, 181-82 (1990). One retains a reasonable expectation of privacy in one's home, vis-a-vis the government, even if one has previously allowed someone else to enter. Similarly, the Wilsons retained a reasonable expectation of privacy in their home, vis-a-vis the reporters, even though the police had the right to enter pursuant to the warrant. The reporters clearly had no such right.

stressing the independence of the officers' and private party's searches, 65 F.3d at 358-59, served only to explain why 18 U.S.C.A. § 3105 (West 1985) did not offer a defense to the officers. Section 3105 provides that a search warrant may be served by a person not mentioned in the warrant only if the third party acts "in aid of the officer on his requiring it, he being present and acting in its execution." 18 U.S.C.A. § 3105 (West 1985). Daniel Buonocore's Fourth Amendment rights would still have been violated if the private party who searched his house at the invitation of the police officers had followed them around the house, going only where the officers went, as long as the private party was acting independently of the officers, that is, not in their aid.

Nor is the majority correct to assert that the photographing of the Wilsons, undressed, was not a "seizure" because it did not "meaningful[ly] interfer[e] with" their "possessory interests in . . . property." Majority opinion at 8 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)) (internal quotation marks omitted). We have in the past recognized that "taking a photograph may, under some circumstances, constitute an unreasonable seizure." *United States v. Espinoza*, 641 F.2d 153, 166-67 (4th Cir. 1981) (finding that where an officer has a right to be in a given location, he may take photographs of what he sees in plain view, thereby " 'seizing' those views themselves as evidence."). The reporters, however, had no right to be within the Wilsons' home, and the Wilsons unquestionably had a possessory interest in their undressed likenesses. Had their photographs been published, they might have sued the *Washington Post* for invasion of privacy. *See Lawrence v. A.S. Abell Company*, 475 A.2D 448, 453 (Md. 1984) (recognizing that a newspaper can be sued for appropriation of another's likeness, but not if the picture is news, taken while in a public place at a newsworthy event). The

photographer did not have the Wilsons' permission to photograph, nor was the Wilsons' home a public place. The property interest was clearly established well before the search in 1992.

The majority concludes its discussion of the reporters' actions by asserting that

> reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant.

Majority opinion at 8-9. One need only follow that assertion to its logical conclusion to see that it reduces to an absurdity. It implies that if a police officer had a warrant addressed to him by which he could invade someone's privacy, he could reasonably have believed that it was permissible to allow any other party to do whatever was authorized by the warrant. If, for example, the police officers had a warrant to perform a body cavity search upon Mrs. Wilson, the majority implies that they could have believed the warrant authorized them to allow members of the public to watch and then to perform the body cavity search themselves. Furthermore, assuming that a photograph is not a seizure, a police officer conducting a strip search pursuant to a warrant could believe the warrant authorized him to invite newspaper photographers to photograph Mrs. Wilson being stripped.

Of course this is ridiculous. Such a search would be patently unreasonable. But it would be one in which the reporter had seen

no more than the officer was entitled to see, and in which the photographer, for his own private benefit, took pictures no more intrusive than the police *could* have taken if they *had* had a legitimate reason to do so. In today's case the majority finds that it was not clearly unreasonable for a police officer to force at gunpoint a citizen in his underwear to pose for a camera, potentially to be exhibited to the entire viewing readership of the *Washington Post*. This, too, was patently unreasonable.

In sum, the reporters' observations and photography constituted an additional private search and seizure not described in the warrant nor carrying out its purposes. The officers' inviting the reporters into the home to conduct their search for news while the officers executed the arrest warrant thus falls squarely under *Buonocore*, and was clearly prohibited by the Fourth Amendment in 1992.

> To conclude otherwise would authorize law enforcement officers to invite private individuals to engage in conduct that would constitute trespass were it not conducted under the guise of a search warrant. Neither the Fourth Amendment nor § 3105 grants government agents such authority.

Buonocore, 65 F.3d at 359.

III.

Although the exact issue of police inviting news media to observe and record the execution of an arrest warrant within a home has never been discussed by the Supreme Court or the Fourth Circuit, three other circuits have asked whether officers deserved qualified immunity under facts substantially similar to

the *Wilson* case.[16] The Second Circuit in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), held that "an objectively reasonable officer [on March 5, 1992] could not have concluded that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was in accordance with Fourth Amendment requirements," *id.* at 686. That Circuit's analysis is worth quoting at length:

> [The officer] correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities. He therefore argues that there was no clearly established rule prohibiting such an act. The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. [The officer] exceeded well-established principles when he brought into the [private] home persons who were neither authorized by the warrant

16. The majority misunderstands my description of the reasoning of other circuits in similar cases. *See* majority op. at 12-13. Of course I do not "rel[y]" on the "*decisions*" of these circuits to support the proposition that the law was clearly established at the time of the execution of the warrant in the Wilson home, for the simple reason that these decisions were announced *after* the execution of the warrant. However, the *reasoning* used by these circuits is instructive.

to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.

> The unreasonableness of [the officer's] conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect — the right of privacy. The purpose of bringing the . . . camera crew into the [private party's] home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy.

Id.

We should wholeheartedly agree with the foregoing discussion. *See also Hagler v. Philadelphia Newspapers, Inc.*, 1996 WL 408605, *2 - *3, 24 Media L. Rep. 2332 (E.D. Pa. July 12, 1996) (adopting and quoting the reasoning of *Ayeni*); *but see Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (criticizing *Ayeni* for its "failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms").

The most recent circuit court decision to address the question, *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), holds that it was clearly established in 1993 that police officers violate the Fourth Amendment when, in executing a search warrant on private premises, they planned and assisted in the television broadcasting of that search despite no mention in the warrant of any media presence, *see id.* at 510-12.

The Bergers contend that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. We hold they are correct and that the federal officers are not entitled to qualified immunity.

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose. The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses. . . . We must heed its strictures on the potential abuse of law enforcement powers. This search violated its protections.

Id. at 510-11.

The Ninth Circuit stressed that the extent of the law enforcement officials' involvement in planning, cooperating with and assisting the media presence was unprecedented, surpassing the more passive role played by police in cases such as *Wilson v. Layne*. *See id.* at 511-12 (distinguishing the panel opinion in *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997)). However, the execution of the arrest warrant at the Wilsons' home, just like the

search of the Bergers' ranch, "at all times was intended to serve a major purpose other than law enforcement." *Id.* at 510. Both searches were also intended to serve the private interests of the media. These invasions, no less than the search of the Ayeni's home, turned private property into a stage for "law enforcement theatricals." *Ayeni*, 35 F.3d at 686.

Relying on *Ayeni* and *Buonocore*, the Ninth Circuit found that the officers who orchestrated the media invasion of the Bergers' Fourth Amendment rights were unprotected by qualified immunity. *Berger*, 129 F.3d at 511. The Circuit found "even further support for this view when [it] observe[d] that no circuit court decision ha[d] ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside of the scope of the warrant." *Id.* The circuit recognized that the Fourth Amendment establishes a presumption that such invasions are prohibited unless justified by a warrant or by some exception to the warrant clause. In *Berger*, just as in *Wilson*, the warrant made no mention of media presence, the presence of members of the media was not reasonably necessary to assist in execution of the warrant, and no exigency presented itself that prevented the police from seeking to provide for media presence in the warrant. Because the broadcast of the search was not intended to serve law enforcement purposes but rather was undertaken, as in the case of the Wilsons, for commercial entertainment, the Ninth Circuit held that the officers did not enjoy immunity. *See id.* at 512.

The Eighth Circuit held in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), that it was not

"self-evident[17] that the police offend general Fourth Amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant," and that therefore this did not violate any clearly established right as of 1994, *id.* at 447. The Eighth Circuit observed that "most courts have rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it," dismissing *Ayeni* and *Buonocore*[18] as "indicat[ing] at most only the beginnings of a trend in the law." *Id.*

Conspicuously absent from the *Parker* opinion is any discussion of the constitutional principle limiting an officer executing a warrant to those actions expressly authorized by the warrant or reasonably necessary to effect its legitimate law enforcement purpose. Indeed, the Eighth Circuit completely disregarded the Supreme Court's directive in *Anderson v. Creighton*, 483 U.S. 635 (1987), that it must look not only for a case on point holding that the officers' actions were prohibited, but also to related and analogous law to discover whether the unlawfulness of the officers' actions was apparent, *id.* at 640; *see also Recent Case*, 110 Harv. L. Rev. 1340, 1342-44 (1997) (The Eighth Circuit "improperly ended its inquiry after ascertaining that no case had explicitly identified such a right at the time the officers conducted their search. Instead, the court should have considered whether an existing precedent falling along the spectrum between general Fourth Amendment principles and a previous case on point clearly established a constitutional right to be free from media intrusion at the execution of a search.").

17. Whether something is "self-evident" depends on who is doing the looking.

18. And would presumably dismiss *Berger* as well.

Had the Eighth Circuit conducted the broader inquiry that *Anderson* requires, it would have considered the well-established principles recounted above, which are so central to the analysis. Perhaps, then, it would have come to a wiser result. *See id.* at 1345 ("Had the Eighth Circuit followed *Anderson*'s guidance, it might have reached a different result. Instead, it too hastily legitimated the practice of tag-along journalism. . . . Faced with an issue of increasing constitutional urgency, the court should have undertaken the more careful, nuanced analysis that *Anderson* invites.").

The majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough. They will, I hope, reach a more just conclusion than have we.

IV.

Perhaps the reason for the disagreement between the majority and myself, about whether the reporters' presence was reasonably necessary to accomplish a legitimate law enforcement purpose, results from a disagreement about what that question means. I believe that the role which the reporters played at the Wilson home is a question of historical fact, which can be discovered by questioning the witnesses. In this case, the police officers have admitted both at the district court level and here on appeal that the reporters were merely bystanders and played no role in the execution of the arrest warrant itself.

The majority, on the other hand, does not treat the role of the news reporters as a question of historical fact, but rather as

one of law which itself must be clearly established. The majority asked whether it was clearly established to a reasonable police officer that the reporters could not serve a legitimate law enforcement purpose. Such an approach will exonerate even the most culpable officers.

We know that the actual purpose for which the police officers brought along the reporters was not reasonably necessary to the execution of the warrant. We need not ask whether it was clearly established that some *other* purpose, which the police officers never actually thought about, could not have reasonably been thought necessary to the execution of the warrant. But I note, for completeness, that I do not believe that the hypothetical reasons described in the majority opinion (e.g., "affording protection to the officers" or "facilitating accurate reporting," majority op. at 9) are sufficiently necessary to the execution of an arrest warrant to justify the undermining of the sanctity of the home and the fundamental principle behind the Fourth Amendment that a man's home is his castle.

The majority goes much too far when it sanctions unconsented to public tours of private homes, with photography allowed, under the guise of an arrest warrant. After today, any police officer entering a private home under a search or an arrest warrant may bring along any observer as a bystander, even an observer there only to serve his own commercial purposes or to satisfy mere curiosity. Regardless of the officers' actual reasons for bringing the third party along, this Circuit will immunize the officer because the third party's presence might have reduced the possibility that the target of the warrant would resist arrest, or because "public oversight of law-enforcement activities . . . deters crime, as well as improper conduct by law enforcement officers," *id.* Far from protecting us against tyrannical police practices, the majority's

opinion today threatens one of the most sacred rights protected by the United States Constitution. From now on in the Fourth Circuit, unlike the Second or Ninth, if ever the government need enter a private home, the home — and its occupants — can be laid bare for all the world to see.

The Fourth Amendment guarantees that the sanctity of the home, one's castle, will not be disturbed unless by warrant or pursuant to a specific warrant exception. These reporters were not mentioned in the warrant. Their presence was not justified by any exception to the warrant clause, nor was it reasonably necessary to accomplish the purposes of the warrant. These reporters were in the Wilsons' home strictly for their own commercial news-gathering purposes. When police orchestrate the entry of third parties, including newspaper reporters, into a private home without the consent of the homeowner, without the authorization of a warrant, for no legitimate law enforcement need and justified by no exigent circumstances, they violate the clearly established protections of the Fourth Amendment.

From the majority opinion, I dissent. Judges Ervin, Hamilton, Michael, and Motz join in this dissenting opinion.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 11, 1997

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1185

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

Plaintiffs-Appellees,

v.

HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOSEPH L. PERKINS; JAMES A. OLIVO,

Defendants-Appellants,

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; ERIC E. RUNION; MARK A. COLLINS; BRIAN E. ROYNESTAD,

Defendants.

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No. 96- 1188

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

Plaintiffs-Appellees,

v.

MARK A. COLLINS; ERIC E. RUNION; BRIAN E. ROYNESTAD,

Defendants- Appellants,

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; JOSEPH L. PERKINS; JAMES A. OLIVO,

Defendants.

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge.
(CA- 94- 1718- PJM)

Argued: January 30, 1997

Decided: April 11, 1997

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Before RUSSELL and WILKINS, Circuit Judges, and HERLONG, United States District Judge for the District of South Carolina, sitting by designation.

• • •

OPINION

WILKINS, Circuit Judge:

Charles H. Wilson and Geraldine E. Wilson (the Wilsons)[1] brought this action against federal and state law enforcement officers and others not pertinent to this appeal. The Wilsons allege that their Fourth and Fourteenth Amendment rights were violated when officers entered their home and sought to execute an arrest warrant for their son. *See* 42 U.S.C.A. § 1983 (West 1994); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395- 97 (1971). The district court granted summary judgment in part in favor of the officers, but refused to do so on the Wilsons' claim that the officers violated the Fourth Amendment by permitting two newspaper reporters to accompany them into the Wilsons' home and photograph the officers' attempt to execute the arrest warrant. The officers appeal from the decision of the district court denying them qualified immunity with respect to this claim. We reverse.

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1. Raquel Wilson joined the Wilsons as a plaintiff in this action on behalf of her daughter Valencia Snowden, the Wilson's grandchild who was present during a portion of the actions that form the basis of this lawsuit. For ease of reference, however, we refer only to the Wilsons as prosecuting this litigation.

Appendix B

I.

The material facts are not disputed. On April 14, 1992, federal and state law enforcement agents were engaged in a joint effort to apprehend fugitives with a history of armed, violent, criminal conduct. A team composed of Joseph L. Perkins and James A. Olivo of the United States Marshals Service and Mark A. Collins, Brian E. Roynestad, and Eric E. Runion of the Montgomery County, Maryland Sheriff's Department was formed to execute an outstanding arrest warrant.

The warrant stated:

> THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETINGS: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON IF HE/SHE BE FOUND IN YOUR BAILIWICK
>
> . . . .

J.A. 124. In addition, two newspaper reporters, one outfitted with a stillshot camera, were to accompany the officers to observe and chronicle the execution of the warrant. The reporters' participation was part of a two-week, news-gathering investigation by the newspaper; it was not designed to serve any legitimate law enforcement purpose.

During the early morning hours, the officers proceeded to the address listed in police reports, as well as probation and court records, as the fugitive's home. Upon entering the residence, the officers encountered a man dressed only in undergarments who was very angry because of the intrusion. The confrontation between the man and the officers ultimately resulted in the officers

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subduing the man on the floor. In the meantime, a woman dressed in a sheer nightgown emerged from the back of the house. These two individuals were later identified as the Wilsons. The subject of the warrant, the Wilsons' son, was not present. Throughout these events, the reporters observed and photographed what transpired.[2]

The Wilsons subsequently brought this action against the federal and state officers who comprised the arrest team that entered their home, the team's supervisor, Harry Layne, and others not pertinent to this appeal. The Wilsons asserted that their constitutional rights under the Fourth and Fourteenth Amendments were violated by the officers' actions in three ways: (1) the officers used excessive force in attempting to execute the arrest warrant; (2) the officers lacked probable cause to believe that the fugitive would be found at the Wilsons' home; and (3) the officers permitted representatives of the media to enter the Wilsons' home to observe and photograph the execution of the arrest warrant. Ruling on the officers' motion for summary judgment, the district court dismissed the allegations of use of excessive force and lack of probable cause, concluding that the evidence viewed in the light most favorable to the Wilsons demonstrated that the amount of force the officers employed was reasonable and that the officers possessed probable cause to believe that the fugitive they sought would be found at the Wilsons' home. However, the district court rejected the officers' assertions that allowing the reporters to enter the Wilsons' home without their consent did not violate their constitutional rights. Furthermore, the district court refused to accept the officers' alternative argument that, at a minimum, they were entitled to qualified immunity because in April 1992, the law was not clearly established that permitting members of the media to accompany law enforcement officers

2. These photographs have never been published.

into a private residence during the execution of an arrest warrant was unconstitutional. The officers appeal this latter ruling.[3]

II.

A.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (en banc). In analyzing an appeal from the rejection of a qualified immunity defense, our first task is to identify the specific right that the plaintiff asserts was infringed by the challenged conduct. *Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). The court then must consider whether, at the time of the claimed violation, this right was clearly established and " 'whether a reasonable person in the official's position would have known that his conduct would violate that right.' " *Id.* (quoting *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992)).

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3. The district court denied the Wilsons' request to certify for immediate appeal its rulings with respect to the allegations of use of excessive force and lack of probable cause to permit those issues to be considered in conjunction with the appeal of the question of the officers' entitlement to qualified immunity. As a result, the only issue pending before us is the qualified immunity inquiry. And, because the facts are undisputed, this question presents a purely legal inquiry into whether the law was clearly established when the underlying events occurred. Thus, we may properly consider this appeal. *See Johnson v. Jones*, 115 S. Ct. 2151, 2159 (1995); *Winfield v. Bass*, 106 F.3d 525, 528-30 (4th Cir. 1997) (en banc).

The constitutional right that the Wilsons claim the officers violated, defined at the appropriate level of specificity, is their Fourth Amendment right to avoid unreasonable searches or seizures resulting from the officers' decision to permit members of the media, who were not authorized to execute the warrant and were not present to aid law enforcement efforts, to enter into a private residence, without the homeowners' consent, to observe and photograph the execution of an arrest warrant. The question before us, then, is whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it.

B.

Early cases considering the constitutionality of law enforcement officers allowing members of the media to enter a private residence to observe or record the execution of a warrant are scarce. But, the few decisions that we have located on this issue are uniform in concluding that such conduct does not violate constitutional principles. *See Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984) (rejecting argument that police violated the Fourth Amendment by permitting media to enter home and film arrest on the basis that no protected privacy interest was violated); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980) (declining to accept plaintiff's assertion that officers violated his constitutional rights by inviting the press to be present during the execution of a search warrant at his residence); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) (rejecting claim that officers infringed the Fourth Amendment by allowing a television reporter to enter plaintiff's property and film search, reasoning "that the filming and television broadcast of a reasonable search and seizure, without more, [do not] result in unreasonableness").

Subsequently, in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), which was decided approximately one month prior to the incident under review, the court held that law enforcement officers may violate the Fourth Amendment by permitting a security guard to accompany them into a private residence to execute a search warrant and to engage in a search for items that were not described in the warrant. *Id.* at 701-05. The court explained:

> [W]here an intrusion is justified, whether by warrant or by probable cause and exigent circumstances, police are temporarily placed in control of the premises and its occupants. It is as though the premises were given to the officers in trust for such time as may be required to execute their search in safety and then depart. Officers in unquestioned command of a dwelling may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises. The warrant in this case implicitly authorized the police officers to control and secure the premises during their search. . . . It did not implicitly authorize them to invite a private security officer to tour plaintiff's home for the purpose of finding [evidence not specified in the search warrant]. . . .

Id. at 704-05 (internal quotation marks omitted). Based on this reasoning, the Court of Appeals for the Sixth Circuit held that the officers' conduct presented a jury question concerning whether the officers had exceeded the scope of the search warrant and remanded for further proceedings. *Id.* at 705.

Such was the state of the law in April 1992 when the events underlying this litigation occurred. No court had held unconstitutional conduct similar to that in which the officers here engaged, and in fact those courts addressing the constitutionality of similar conduct had expressly upheld it. Moreover, the only court to have found a constitutional problem with a third party accompanying officers to execute a warrant had done so under circumstances in which the officers had exceeded the scope of the warrant by allowing the third party to undertake an independent search for items that were not specified in the warrant — circumstances remarkably unlike those presented by this action.

Subsequent to the events underlying this action, the Court of Appeals for the Second Circuit addressed exactly the question presented here in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), and held that it was clearly established in March 1992 that officers violated the Fourth Amendment when they permitted a television crew to enter a private residence and film the execution of a search warrant that provided no authorization for their presence. *Id.* at 684-86. The court reasoned that although there were no decisions expressly holding that searching agents violate the Constitution by bringing members of the press into a home to observe and report on their activities, it had

> long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of

> the warrant. [The defendant officer] exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.

Id. at 686. Furthermore, the court held that an objectively reasonable officer could not have failed to appreciate "that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was [not] in accordance with Fourth Amendment requirements." *Id.*

The Court of Appeals for the Eighth Circuit, however, on materially identical facts, reached the opposite conclusion in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), also decided after the events relevant to this litigation. Relying on the dearth of authority holding the conduct in question to be violative of the Fourth Amendment, the existence of decisions holding that these types of actions by law enforcement officers did not transgress constitutional principles, and the lack of Supreme Court direction on the question, the *Parker* court held that officers were entitled to qualified immunity. *Id.* at 447. We agree.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only for "transgressing bright lines." *See Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the

existing authority must be such that the unlawfulness of the conduct is manifest. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). When these officers acted, however, the smidgen of case law that had considered the constitutionality of permitting the media to accompany officers into a private residence while they executed a warrant had found no constitutional infirmity with the practice.[4] Further, we cannot agree with the Court of Appeals for the Second Circuit that simply because the objective of the Fourth Amendment is to preserve privacy in the home to the greatest extent possible consistent with reasonable law enforcement efforts, the unlawfulness of the officers' conduct must have been apparent. *See DiMeglio v. Haines*, 45 F.3d 790, 803-04 (4th Cir. 1995) (explaining the importance of examining the law at the appropriate level of particularity to decide whether it is clearly established to such an extent that a reasonable officer would understand the illegality of the conduct at issue).

We stress that we are not called upon to determine whether the officers' conduct was constitutional or appropriate, only whether the legal landscape when these events occurred was

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4. In support of their contention that the law was clearly established, the Wilsons also rely on *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). This case is inapposite. In *Houchins*, the Supreme Court considered whether First Amendment rights asserted by a television station were violated by prohibiting representatives of the station from filming inside a prison. A plurality of the Court — in a footnote to a recitation of the explanations offered by prison officials for preventing the filming, one of which was that it would infringe on inmate privacy — wrote that inmates "retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Id.* at 5 n.2. This footnote provides no support for the existence of a clearly established Fourth Amendment right prohibiting a law enforcement officer from permitting a member of the media to accompany him into a private residence during the execution of an arrest warrant.

sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative of the Fourth Amendment. Because in April 1992 it was not clearly established that permitting media representatives to accompany law enforcement officers into a private residence to observe and photograph their attempt to execute a warrant would violate the homeowner's constitutional rights, we hold that these officers are entitled to qualified immunity.[5] Consequently, we reverse the

5. Our decision in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), does not dictate a contrary result. The facts underlying *Buonocore* were essentially identical to those at issue in *Bills*: Officers allowed a security guard to enter a private residence and conduct a search for property not authorized by a warrant. In the appeal from the denial of summary judgment to the officers, we characterized the issue presented as whether it was clearly established on November 24, 1992 that "Fourth Amendment law prohibited government agents from bringing a private citizen into Buonocore's home to conduct an independent, general search for items not identified in any warrant." *Id.* at 353 (internal quotation marks omitted). And, we held that it was, reasoning:

> [W]e have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not reasonable. It obviously exceeds the scope of the required specific warrant and furthermore violates the sanctity of private dwellings.

Id. at 356 (internal quotation marks omitted). *Buonocore*, therefore, addressed the question of whether a third party, who is not authorized by the warrant to conduct a search, may accompany law enforcement officers in executing a warrant and undertake an independent search for items not described in the warrant — an issue much different than the one presented to us.

Here, the Wilsons agree that the reporters who accompanied the officers into their home did not engage in a search of, or intrude into, any areas of their

(Cont'd)

decision of the district court refusing to grant summary judgment in favor of the officers.

REVERSED

RUSSELL, Circuit Judge, dissenting:

I cannot agree with the majority's disposition that the officers have not violated clearly established law. The Fourth Amendment prohibits "unreasonable searches and seizures." It is not reasonable for officers to invite reporters into a private home while they execute an arrest warrant. In this case, the act of bringing reporters into the Wilsons' home, and allowing them to take photographs and remain in the home, was particularly unreasonable. The officers clearly had the wrong man, and the reporters, complete strangers to the Wilsons, photographed them in embarrassing states of undress.

At 6:45 in the morning, plainclothes officers entered the Wilsons' home while Mr. and Mrs. Wilson were lying in bed.

(Cont'd)

home into which the officers would not have been permitted to go. Moreover, the Supreme Court has indicated that a seizure only occurs when there has been a "meaningful interference with an individual's possessory interests in . . . property" — a circumstance not alleged here. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (recording the serial numbers on equipment "did not meaningfully interfere with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure" (internal quotation marks omitted). *But see Ayeni*, 35 F.3d at 688. Although an application of this definition indicates that the photographic images captured by the reporters were not seized within the meaning of the Fourth Amendment, we need not decide this issue because, at a minimum, it was not clearly established that it was.

Hearing a commotion, Mr. Wilson, wearing only his undershorts, got up to investigate, and encountered a number of plainclothes officers with guns in his living room. When Mrs. Wilson, wearing only a thin, sheer nightgown, came out of the bedroom, she found her husband face down on the floor with an officer holding a gun to his head.

The officers should have immediately realized that Charles Wilson was not Dominic Wilson. A photograph and description of Dominic Wilson given to the officers identified him as 27 years old, 185 pounds and clean shaven. Charles Wilson, Dominic's father, was 47, weighed 220 pounds, and wore a beard that was almost completely white. Nonetheless, Charles Wilson was kept face down on the floor for at least 10 minutes while the police determined that Dominic Wilson was not in the house.

While all this was going on, two *Washington Post* reporters took photographs of the scene and the interior of the Wilsons' home. The reporters, a male and a female, had entered the Wilsons' home with the officers and at their invitation.

I believe the officers acted unreasonably in this case, first by allowing the reporters into the home, and then by permitting them to take photographs of Mr. Wilson face down on the floor in his undershorts, and Mrs. Wilson in her sheer nightgown. I agree with the Second Circuit's analysis that Fourth Amendment jurisprudence long ago clearly established that police may not invite reporters into private homes when they are executing warrants if those reporters are neither "expressly nor impliedly authorized to be there." *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994). Furthermore, the majority reads our opinion in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), too narrowly. Although the strict holding of *Buonocore* addressed the issue of

third parties who accompanied officers on the execution of a search warrant, and then exceeded the limits of the warrant, the opinion can be fairly read to prohibit "government agents from bringing a private citizen into [the Wilsons'] home" whose presence is unrelated to the execution of the warrant. *Id.* at 353.

Finally, because the Supreme Court is not likely to offer guidance in this area anytime soon, *see Parker v. Boyer*, No. 96-883, 1997 WL 73486 (U.S. Feb. 24, 1997), *denying cert. to* 93 F.3d 445 (8th Cir. 1996) (no clearly established law prevented reporters from entering private home with police), I would use this opportunity to apply the analyses of *Ayeni* and *Buonocore* to these facts.

I respectfully dissent.

APPENDIX C — EXCERPTS OF TRANSCRIPT OF MOTIONS HEARING DATED DECEMBER 4, 1995

Case No.: PJM-9-1718

6500 Cherrywood Lane
Greenbelt, MD 20770
December 4, 1995

CHARLES H. WILSON, ET AL.,

Plaintiffs,

v.

RAYMOND M. KNIGHT, ET AL.,

Defendants.

TRANSCRIPT OF MOTIONS HEARING
(EXCERPT: OPINION OF THE COURT)
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT COURT JUDGE

* * *

THE COURT: All right. I'm going to give you my decision now, gentlemen, ladies.

This matter is a suit of Charles H. Wilson, et al., against defendants, Mark Collins, Harry Layne, Joseph Perkins, Brian Roynestad, and Eric Runion. It is a civil action for damages and declaratory relief allegedly to redress deprivations of certain civil rights under 42 USC Section 1983 and also with regard to the

federal agents under [*Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)].

Plaintiff Charles Wilson and, I gather, his wife, Geraldine Wilson, are residents of Montgomery County[, Maryland]. The minor plaintiff in the case is Valencia Snowden through her mother and next friend, Raquel [Snowden].

Defendants Collins, Runion, and Roynestad are Montgomery County deputy sheriffs. Defendant Harry Layne was at relevant times in this suit a supervisory deputy U.S. marshal in the U.S. Marshal's Office for the Superior Court of the District of Columbia and site supervisor for the Washington, DC operation [of "Operation Gunsmoke"]. Defendants Perkins and Olivio were deputy U.S. marshals who were involved in the incident that I will describe momentarily. And defendant United States of America is in the case by reason of the fact that the U.S. Marshal Service are employees of same were involved in this transaction.

It appears that in or about February of 1992, the U.S. Marshal Service in a joint effort with the Montgomery County Sheriff's Department engaged in a pursuit of hard-core fugitives including parole and probation violators, an operation called Operation Gunsmoke. Defendant Layne was the Washington area supervisor of this venture. And Montgomery County, pursuant to memorandum of understanding on or about February 12, 1992 executed by their sheriff, agreed to participate in this joint venture, Operation Gunsmoke.

The events in question began in or about April of 1992 when the Circuit Court for Montgomery County issued a bench warrant for the arrest of one Dominic Jerome Wilson based on alleged violation of probation. Wilson was apparently on probation for,

as I understood it, robbery at the time. He also had a record which involved elements of violence in his past and was specifically — it was noted to the arresting officers that he was potentially armed and could be dangerous and violent. That was part of the factual base at the time.

In the records of the Montgomery County Sheriff Department, Dominic Wilson had listed as his address 909 North Stone Street Avenue in Rockville and that those records also were similar to records that were held by the probation office involved with active probation that Wilson was being sought for violation of. And that that address had been listed on numerous occasions by Wilson as his address. It turns out that the address was, in fact, the home of Charles and Geraldine Wilson, the parents of Dominic Wilson.

With that information and with the warrant in hand, various of the defendants came upon the 909 North Stone Street address at approximately 6:30 a.m. on April 16, 1992. Now, as I understand it, all the defendants but Layne were on site at that time, is that correct, both the sheriffs and the marshals.

According to the allegations of the defendants, just before they knocked on the door, they had taken into custody the brother of Dominic Wilson on a presumably unrelated charge. And he had been driven to the front of the premises and had indicated some time within 30 to 45 minutes prior to the entry that, in fact, Dominic Wilson lived at that address and, in fact, had been there the night before.

The further indication is that at approximately 6:45 a.m. when the defendants knocked at the address, the child, Valencia Snowden, then nine years old, as it happened the daughter of

Dominic Wilson, although that was not known to the officers at the time, answered the door. The allegation of the defendants is that when she answered the door, the inquiry was is Dominic Wilson at home and she answered she didn't know. And then presumably there is some dispute about whether there was a knock and announce, although the officers indicate that they announced that they were there with a warrant for the arrest of Dominic Wilson.

The officers then entered into the home at this early morning hour. And plaintiffs, Charles and Geraldine Wilson, were in their bedroom in bed. They heard commotion and got up, came to the door, and were confronted by Perkins, Olivio, and Collins pointing guns and that Mr. Wilson raised his hands and stood still. He was only dressed in his undershorts. According to the plaintiffs, the defendant did not identify themselves. They say that he did. In any event, there was an alleged statement by Perkins to Wilson at gunpoint to "get the fuck on the floor." And then at that point Wilson was forced to the floor as he was complying with Perkins' order. It is alleged also by Wilson that [Olivo] put his knee into Wilson's back and held the gun to his head while he lay on the floor. And that Geraldine Wilson came to the scene and observed what went on while all this was happening.

There was questioning about the whereabouts of Dominic Wilson, the adult son of the plaintiffs. The defendants had photographs of Dominic Wilson, and they showed the photographs. And it was obviously not the same person as Charles Wilson whom they encountered at that time. It is alleged by the plaintiffs that they indicated that first of all, that plaintiff Charles Wilson was not Dominic Wilson, that Dominic Wilson did not live there, and that he wasn't there, and that he hadn't been seen for two weeks. And that was apparently confirmed by

Mrs. Wilson. There was some alleged threats that the Wilsons might be incarcerated if Wilson was found in their house, that is Dominic Wilson. In any event, there was a search for the home. Nobody else was in the home other than the child. Mr. Wilson indicates that he was forcibly restrained on his living room floor at gunpoint for approximately 10 minutes including, he says, after defendants had verified the there was no one else in the home. Then the defendants left. Apparently there was also some alleged shouting by the defendants at Mr. Wilson. The defendants say that Mr. Wilson himself shouted and used epithets during that time.

That is essentially the factual predicate of the case as far as any alleged physical imposition upon the plaintiffs.

The other fact of some significance is in the case that, pursuant to a media ride along policy that was apparently in effect in at least this region of the marshal's service, one or more reporters and/or photographers from the Washington Post accompanied marshals and sheriffs in their operations including in the Wilson home on that evening. And it appears that either one — were there two total, a photographer and a reporter? That both may have entered the home that [morning]. And the photographer, I think it is stipulated, did take pictures of Mr. Wilson when he was in custody under arrest, possibly on the floor in his undershorts being restrained as he was. And that they were not in the home with the consent of the Wilsons, but they simply tailed along, piggybacked on the warrant that the officers had with regard to Dominic Wilson

This suit has followed, and in the second amended complaint, there are allegations against all of the defendants in this case, specifically with regard to all who entered the premises, that there

was an unlawful entry and search in the case. And secondly, that there was an unlawful search in that the media was brought in to accompany the officers who were operating pursuant to the arrest warrant. And third, that once inside, one or more of the officers applied excessive force to the Wilsons in trying to execute this warrant. There is no dispute that Dominic Wilson was not found on the premises at that time, and eventually the officers all departed.

The Court will address these several issues now as it has various motions for summary judgment filed before it, motions by the individual defendants, both county and federal.

* * *

Which [brings] us to the third claim that is alleged against the defendants.

* * *

THE COURT: Let us stay with the third cause of action against which alleges essentially unreasonable search and seizure based on what is said to be the unauthorized presence of the Washington Post reporter and photographer. Now, this is characterized as possibly negligence or gross negligence or intentional infliction of emotional distress or trespass or invasion of privacy or some such. It comes in a lot of different forms. For present purposes, I'll just address it as an unreasonable search and seizure.

The argument that is made by the plaintiffs with regard to the presence of the officers is that that violates Fourth Amendment rights, and essentially, if you will constitutes an invasion of privacy.

I think that's really the essence – or trespass. That's the essence of what we're talking about. And that particularly insofar as the home is involved, that that is a particularly protected location.

The analysis that the defendants offer in this regard is that, assuming that a specific right has been allegedly violated, that at the time of the violation, [April 16, 1992], that right was not clearly established. And even if it was clearly established, then a reasonable person in the officer's position would have known that — in this case, would not have known according to the defendants that what he was doing would violate that right. The defendants cite some cases from other jurisdictions in which it was held as of the — some time in or about the time frame that these events occurred that the presence of a third person, such as reporters, would not rise to the level of a constitutional tort. And among the cases that are relied on showing decisions directly contra were [*Moncrief v. Hanlon*, 10 Med. L. Rptr. (BNA) 1620 (N.D. Ohio Jan. 6, 1984),] where a news media accompanied police into a search. And the federal court in Ohio objected the holding that there was a constitutional tort stated. [*Higbee v. Times Advocate, Inc.*, 5 Med. L. Rptr. (BNA) 2372 (S.D. Cal. Jan. 9, 1980], to the same effect; and [*Prahl v. Brosamle*, 294 N.W.2d 768 (Wis. Ct. App. 1980)]. And that that is meant to show that there was no clearly established right. The defendants also rely on a more recent case from the Sixth Circuit, [*Bills v. Aseltine* 52 F.3d 596 (6th Cir. 1995)]. And all that is meant to suggest that the right, whatever it was, was not clearly established at the time.

The plaintiffs rely principally on a case from the Second Circuit, [*Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995)], where television reporters seeking on-the-scene coverage of dramatic event had accompanied law

enforcement officers inside homes in connection with raids that were being made there. The Second Circuit, Chief Judge Newman writing the opinion – I think I indicated the cite, 35 F.3d 680 — went on to discuss the issue in this case. And he was citing some — actually, March 1992 was the date of the actions in the *Ayeni* case.

And the Second Circuit said [at] 35 F.3d at 686:

> Agent Mottola correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities. He therefore argues that there was no clearly established rule prohibiting such an act.

The Court says:

> The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. And that in the normal situations where warrants are required, law enforcement officers' invasion of privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. Mottola exceeded well established principles when he brought into the [Ayeni] home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a sound stage for law enforcement theatricals.

Appendix C

> The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect, the right of privacy. The purpose of bring the CBS camera crew into the [Ayeni's] home was to permit public broadcast of their private premises, and thus to magnify needlessly the impairment of their right to privacy.

In [*Buonacore v. Harris*, 65 F.3d 347 (4th Cir. 1995)], a case just decided in the last two months by the Fourth Circuit, we have some interesting parallels. There the opinion was written by Judge [Motz] of the circuit. The two law enforcement officers, after obtaining a warrant to search a home, invited a private person to engage in an independent general search of the home for items that were not mentioned in the warrant. Apparently it was a telephone company operator looking for tools or equipment. And an action was brought by the homeowner alleging violations of his civil rights, and the defense of qualified immunity was offered. Summary judgment was moved, and it was refused by the trial court, and the appeal was dismissed by the Fourth Circuit, but there is ample discussion in the case about the qualified immunity issue and whether bringing along a private person to aid in a search would pass muster under the Fourth Amendment. And it is clearly the decision of [the court that] whether or not there was a cause or action that could go forward obviously depend[ed] on whether the specific right violated was clearly established at the time.

The Fourth Circuit discussion, as I was saying, gets into a great deal of consideration of general warrants and whether in

Appendix C

effect bringing in a private person as part of a specific warrant in effect breached the clearly established right of someone not to have the privacy of their home breached by someone who was not an official and not acting pursuant to a specific warrant. And if you look at the language in the opinion, there's a great deal of discussion about the importance of the privacy of the home. Just looking randomly at 65 F.3d [at] 355, speaking about James Otis,

> General warrants were not directed solely at authorized officers acting on behalf of the government but could be executed at the request of anyone. And because they had constituted an improper invasion, indeed annihilation of a person's cherished right to privacy, particularly in his own house, they were objectionable.

And going on at page 356:

> Similarly, the special protection to be afforded to person's right to privacy within his own home has also been continuously and consistently recognized by the Court.

And the Court essentially goes on to talk in terms of specific warrants in that case and finds that apparently despite other cases that were analogous such as the ones at hand, that even if there were no cases reported directly on point that would not be enough to prove that the right was not clearly established.

"Clearly established," said the Court of Appeals, "in this context includes not only specifically adjudicated rights but those manifestly included within more general applications of the core constitutional principle invoked, the right to be free from

government officials facilitating a private person's general search of the sort Buonacore alleges was conducted here is manifestly included within core Fourth Amendment protection."

And then most importantly at footnote seven of the opinion, there's a discussion of the [*Ayeni*] case by the Fourth Circuit, and this just being a few months ago. It is indicated that the [*Ayeni*] decision was not squarely on point, but it was deemed sufficiently analogous. And that certainly suggests that the Fourth Circuit was sympathetic to the [*Ayeni*] analysis.

Well, having considered these facts, the Court, first of all, determine[s] whether or not there was any objective reason for the media people to be present. And the Court determines that there clearly would have been a specific right, a constitutional right to be free from unreasonable searches and seizures. And whether you add the invasion of privacy or trespass element to it, the fact it there was a constitutional right it be free from unreasonable searches and seizures, and the presence of a media officer or media individual is not serving any legitimate law enforcement purpose.

The question then becomes whether that right was clearly established as of April 1992 when this matter occurred. If you look at [*Buonacore*], of course, that's a case that arose as of November [1992], although it was just decided. And the Second Circuit and in my view the Fourth Circuit understand that there are certain core rights involving the Fourth Amendment that are abridged regardless of whether there are either no cases that go contra or, frankly, if there are a few cases that go contra as there were here, the Ohio and California and Wisconsin cases. Because in the Court's view, there is a core constitutional right here, to be free from unreasonable searches and right here, to be free from

unreasonable searched and seizures, and that was clearly established as of April of [1992] when these events took place.

Frankly, I think you can analyze this as a breach of the requirement for a specific warrant. That what you've got here are people who are operating, if not directly in aid of a — and in a way, one could argue that they were trying to operate in aid of law enforcement. But to the extent that they weren't, they were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed by the photographer. So that the right was clearly established. And any reasonable officer should have known that what was going on was a violation of a clearly established right.

* * *

MR. ST. HILAIRE: Yes, Your Honor. Just two things I went to make clear. Your Honor is holding that the statement — well, the allegation that taking the press inside the residence states a Fourth Amendment violation and that it was clearly established in 1992.

THE COURT: That's right.

MR. ST. HILAIRE: Okay. We want to make clear because we have to consult with the solicitor general to determine whether an interlocutory appeal —

THE COURT: My statement is that specifically taking — well, analytically I wouldn't say that it's strictly taking the media in. I think, if you ask my view, more generally taking any

unauthorized person into a home violates the Fourth Amendment. Now, we can be more precise about this case and say taking a Washington Post reporter or any media person, whether it's radio, TV — I mean, you're asking me to expand how far I go. It happens to be newspaper people and photographers. But I think taking media people in certainly to observe, photograph, and do whatever constitutes a violation of the Fourth Amendment. I reason though from a much more general base, which is anybody who's unauthorized, frankly, as I read these cases, would constitute an unreasonable search and seizure. I don't think that you can use the authorization of a warrant to bring in anybody for any reason unless arguably you've really get somebody in aid of some sort of an arrest I guess. I don't know. There may be some imaginable circumstances, but they're few and far between.